IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 520

L. T. BARRINGER AND COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

BRIEF ON BEHALF OF APPELLANT

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OPINION BELOW

The report of the Interstate Commerce Commission, Division 3, in *Investigation and Suspension Docket No. 4981, Loading Cotton in Oklahoma* (R. 13-34) appears in 248 I. C. C. 643. The *per curiam* opinion of the specially constituted District Court, accompanied by its findings of fact and conclusions of law, is found in the record at pages 78 to 85, but is not reported.

JURISDICTION

The final decree of the District Court was entered on August 17, 1942, (R. 85). Petition for appeal (R. 87) was filed and allowed on October 7, 1942. (R. 93) Probable jurisdiction was noted by this Court on December 7, 1942. (R. 294) The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913 (Title 28, U.S.C., Secs. 47 and 47a) and Sec. 238 of the Judicial Code as amended by the Act of February 13, 1925 (Title 28, U.S.C., Sec. 345).

QUESTIONS PRESENTED

The Interstate Commerce Commission, by order entered after full hearing in an investigation and suspension proceeding, approved as not unlawful a proposed change in the tariff charges for the loading of cotton at stations in Oklahoma served by the railroad appellees. The proposed change eliminated an existing charge for loading cotton by the railroad appellees at first origin, provided such cotton is subsequently reshipped under transit on carload rates to the Texas ports, the existing charge being continued on the same cotton loaded at the same first origin if subsequently reshipped under transit on carload rates to the Southeast. (See map at back of this brief.) The ultimate question is as to the validity of that order. Subordinate questions are:

(1) Whether the order of the Commission is supported by findings sufficient to disclose the basic facts on which the Commission acted and sufficient to disclose a correct application of statutory standards;

(2) Whether the order and findings of the Commission are supported by the evidence;

(3) Whether the Commission acted upon considerations authorized by the statute.

THE STATUTES INVOLVED

The provisions of Part I of the Interstate Commerce Act (Title 49, U.S.C., Secs. 1-27), under which the case before the Commission arose and was decided are reproduced in full in Appendix "A" hereto. The pertinent provisions thereof may be summarized as follows:

The procedure. Section 15(7) authorizes the Commission, either upon complaint or upon its own initiative without complaint, to suspend for a period of seven months any schedule stating a new rate, charge, regulation, or practice affecting any rate or charge, and to enter upon a hearing as to the lawfulness thereof. After the full hearing, the Commission is authorized to make such order with reference thereto as would be proper in a proceeding initiated after the new schedule had become effective. The burden of proof is imposed upon the carriers proposing the change to show that it is just and reasonable.

The Commission's authority. Section 15(1) authorizes the Commission to enter orders to effectuate the standards of lawfulness provided by the Act. If the Commission finds a violation of such standards, its order may either prescribe maximum or minimum lawful rates and charges and just and fair regulations, or may require carriers to cease and desist from maintaining rates, charges, regulations, etc., which are, or will be, in violation of the Act to the extent found by the Commission.

The tariffs. Section 6(1) requires the publication and filing of schedules showing all rates, fares, charges, regulations, etc. Such schedules "shall also state separately all terminal charges, * * * all privileges or facilities granted or allowed and any rules or regulations

which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered. * * *."

The standards of lawfulness. Section 1(5)(a) provides that "All charges made for any service rendered or to be rendered * * * shall be just and reasonable" and prohibits "every unjust and unreasonable charge for such service or any part thereof."

Section 2 prohibits unjust discrimination as between shippers, which is defined as the collection from one person of a greater compensation "for any service rendered, or to be rendered, in the transportation of property" than is collected from another person for doing for him "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions."

Section 3(1) declares that it shall be unlawful for any common carrier to give any undue or unreasonable preference to any person, locality, or traffic in any respect whatsoever or to subject any particular person, locality, or traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

STATEMENT OF THE CASE

I. PROCEEDINGS IN THE DISTRICT COURT

The appellant buys cotton in the State of Oklahoma, which it ships to domestic mills in the Southeast. The cotton so shipped is sold on the basis of prices delivered at destination, and appellant pays all rates and charges which accrue on said shipments. (R. 260; 279) This cotton is purchased by appellant in competition with cotton merchants who purchase cotton at the same points for shipment to the Texas ports. (R. 259-62; 279-280; 283-4)

The appellant filed its amended complaint in the District Court (R. 1-54; 71) to enjoin and set aside the operation and effect of an order of the Interstate Commerce Commission, Division 3, in *Investigation and Suspension Docket No. 4981, Loading Cotton in Oklahoma*, 248 I. C. C. 643, issued on January 29, 1942, to become effective, as postponed from time to time, on April 21, 1942. The United States of America and the Interstate Commerce Commission were named as defendants. (R. 1)

The Atchison, Topeka and Santa Fe Railway Company and other lines operating from Oklahoma to the Gulf,[1] which were respondents in the proceeding before the Commission, were permitted to intervene as parties defendant. (R. 65)

On July 17, 1942, the District Court rendered a *per curiam* opinion (R. 85) accompanied by its findings of fact and conclusions of law (R. 78-84), in which it found that the order of the Commission was supported by essential findings and by the evidence, and that the Commission did not

[1] These additional lines are Gulf, Colorado and Santa Fe Railway Company, Panhandle and Santa Fe Railway Company, Missouri-Kansas-Texas Railroad Company, and The Kansas City Southern Railway Company. The Oklahoma Railway Company was a respondent before the Commission but did not intervene in the court below.

base its order on matters which it was not legally entitled to consider. The final decree dismissing the complaint was entered on August 17, 1942. (R. 85) From that decree, a direct appeal was taken to this Court.

II. PROCEEDINGS BEFORE THE COMMISSION

A. THE PROPOSED CHANGE

While this case involves only a change in separately established charges for a loading service, it will be helpful to clear understanding to describe the rate structure and the movement of cotton thereunder as described in the evidence, in the report of the Commission, and in the findings of the District Court. (R. 78-9)

Prior to August 7, 1933, cotton transported from Oklahoma, as well as from other states, to destinations all throughout the United States, moved on any-quantity rates. By the term "any-quantity" is meant that the same rate applied regardless of the number of bales offered for shipment. Since these rates were of a less-than-carload character, the line-haul rates included the service of loading the cotton into cars at the original shipping point. (R. 111; 15; 248 I. C. C. 644)[2] This was consistent with the general practise under less-than-carload rates.

On August 7, 1933, the Southwestern carriers established a system of carload rates on cotton, substantially below

[2] Record references from 14 to 348 inclusive, are to the report of the Commission as contained in the printed record. In connection with each such reference, the volume and page of the Commission's print of its report are also given. Record references from 105 to 277, inclusive, are to the evidence introduced before the Commission.

[3] The application of carload rates is conditioned on a specified minimum quantity being tendered by the shipper to the carrier in a single shipment. The carload minima covering the carload rates on cotton from Oklahoma are 25,000, 30,000, and 60,000 pounds to the Texas ports and 25,000, 35,000, and 50,000 pounds to destinations in southeastern and eastern territories. Each of these minima governed different rates, the rates varying inversely with the minima, although not in proportion. (R. 219)

the any-quantity basis, for the purpose of meeting truck competition. (R. 18; 248 I. C. C. 646). Ordinarily, goods which move on carload rates are not loaded by the carriers. The general rule governing such loading, as provided in the Consolidated Freight Classification, is shown on Exhibit 21 in the proceedings before the Commission (introduced at R. 220), and reads as follows (italics ours):[4]

"RULE 27

LOADING OR UNLOADING

"Section 1. Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at CL ratings or rates, *except where tariff of carrier at point of origin* or destination or stopover station (as the case may be) provides for loading or unloading of CL freight by carrier."[5]

Accordingly, the new carload rates did not cover a loading service to be performed by the railroad. Therefore, the railroad appellees and all other Oklahoma lines published a special provision for the loading of cotton moving on carload rates, under which the railroad serving the origin would load the cotton, if requested by the shipper, for a charge of 5½ cents per square bale and 2¾ cents per

[4] A certified copy of the full transcript of the record before the Interstate Commerce Commission, including the oral testimony and the documentary exhibits, was received in evidence by the District Court as Plaintiff's Exhibit 2. (R. 73) The oral testimony contained in that transcript is shown on pages 105 to 278 of the printed record. By stipulation, the exhibits contained in the Commission's record have been omitted in the printing with leave to the parties and to this Court to refer thereto. (R. 293) When such exhibits are referred to herein, the pertinent portions thereof will be reproduced.

[5] In *Loading and Unloading Carload Freight* (July 20, 1925), 101 I. C. C. 394, at page 396, the Commission said:

"The general rule in the United States is and long has been that shippers are required to load, and receivers to unload, carload freight. This rule is embodied in the consolidated classification, and applies generally throughout the country."

A similar statement is found in *McCormick Warehouse Co.* v. *Pennsylvania R. Co.* (November 22, 1928), 148 I. C. C. 299, 300, and in many other cases.

round bale.[6] (R. 115) These provisions are shown on Exhibit 27 before the Commission (Introduced at R. 253) which is reproduced in Appendix "C" hereto. The items there shown under the heading "PRESENT READING" show the rule as applied for the account of all railroads in the State of Oklahoma at the time the case before the Commission started.

The cotton subject to these loading charges is uncompressed and is rarely, if ever, transported in a direct movement from a country origin to final destination. (R. 203; 227-8) Rather, it is initially shipped in small quantities from country stations (gin points) to compresses at concentration stations. Subsequently, after compression and assembly into merchantable lots, the cotton is reshipped in a carload quantity. (R. 15; 248 I. C. C. 644)

At the time of the initial shipment from gin to compress, the railroads assess certain local or transit rates, sometimes referred to as "float-in" rates. Later, when the carload reshipment is made, the railroads collect the full local carload rate from the compress point to final destination. Subsequently, the shipper files a claim with the carriers and the aggregate inbound and outbound charges so paid are readjusted to the basis of the *through* carload rate from gin origin to final destination via the transit station. (R. 113-4 (par. C); 15; 248 I. C. C. 644) The map at the back of this brief shows a typical country origin and transit point as well as representative routes therefrom to the Southeast and the Texas ports.

Pursuant to the approval of the Commission granted in *I. & S. 4276, Cotton Loading Provisions in the Southwest* (April 6, 1937), 220 I. C. C. 702, the loading charge may be paid at the gin origin at the time the service is per-

[6] A square bale of cotton weighs approximately 535 pounds and a round bale half that amount. (R. 141)

formed, or, if not paid then, it follows the shipment and is collected at the time of the settlement of the shipper's transit claim. (R. 183-4) In the case last cited, the Commission noted (pp. 707-8) that "the carload rate * * * does not contemplate free loading," and found that "there is no doubt about the propriety of the carrier exacting compensation for the loading it performs." Subsequent to the case cited, practically no loading charges are paid at the country origin (R. 184); rather, they are collected at the time the transit claim is settled.

The purchaser of the cotton at the transit point who reships under transit on the carload rates obtains his information as to whether the cotton was loaded by the railroad at the country origin, so as to make the charge applicable, from an appropriate notation on the inbound bill of lading and expense bill. (R. 184; 261)

The tariff rule governing the loading of cotton is carried in the tariff which publishes the through carload rates and also in the tariff which provides the transit privilege. The reason for this duplicate publication was explained by the railroad appellees as follows: The transit tariff provides the inbound rates from the country stations to the compress or the warehouse stations, and the rule is published in that tariff in order to make clear the application thereof in connection with such inbound rates. The carload rate tariff is subject to a general rule that cotton moving thereunder must be loaded by shippers. In order to make proper provision for loading by the railroad instead of by the shipper, it is necessary to publish the rule in the carload rate tariff. (R. 135)

As the District Court found (R. 78), the loading charge is maintained and assessed by the individual railroad which performs the loading service.

The proposed change involved in the case before the Commission consisted of inserting an exception to the existing rules in the rate tariff and in the transit tariff. That exception, as shown under the heading "PROPOSED READING," in Exhibit 27 reproduced in Appendix "C" hereto, provides that at points in Oklahoma on the lines of the railroad appellees, cotton tendered to a railroad appellee at its depot or cotton platform will be loaded without charge to the shipper, but *only* in the case of shipments to Beaumont, Corpus Christi, Galveston, Houston, Orange, Port Arthur, or Texas City, Texas, or Lake Charles, La. (See map at back of brief)

This change was confined to cotton handled on carload rates. There are still some through movements under the less-than-carload rates. (R. 111-2) As stated, those rates include the loading service to *all* destinations.

The proposal did not extend to free loading at a compress facility. (R. 122-3) The loading service covered by both the original rules and the amended rules takes place at the gin origin at the inception of the "float-in" movement. At that time, neither the shipper nor the carrier has any knowledge of the particular destinations to which the cotton will be reshipped after concentration at the transit point. While the inbound "float-in" rates to the transit point are paid at the time the "float-in" services are rendered, since these rates are the same on all cotton regardless of ultimate destination (R. 135-6), the application of the loading charge under the amended rule cannot be finally determined until the reshipment in a carload quantity is made from the transit point and the ultimate destination is known. Consequently, at the time cotton is loaded by one of the railroad appellees under the amended rule, neither the railroad nor the shipper knows whether or not the loading charge will ultimately be demanded.

B. THE SUSPENSION AND INVESTIGATION PROCEEDINGS

Upon the written protest of the appellant (R. 103-4) and others, the Commission entered an order on June 11, 1941 (R. 11-12), which postponed the effective date of the proposed change until January 11, 1942, and instituted an investigation into the lawfulness thereof.[7] Subsequently, the respondents before the Commission deferred the effective date until the proceedings before the Commission could be concluded. (R. 15; 248 I. C. C. 644)

As stated by the principal witness for the respondents, "the suspended rule has to do only with the terminal service of loading cotton." (R. 111)

The case followed the course of a full hearing (R. 106), briefs, proposed report, exceptions, oral argument, report and order by the Commission, Division 3 (R. 13-34; 248 I. C. C. 643-655), petition of appellant for reconsideration (R. 35), a denial of that petition and a final order discontinuing the proceeding as of April 21, 1942. (R. 6)

The proponents of the proposed change included the railroads, for whose account it was published, who were the sole respondents before the Commission, the United States Department of Agriculture, and the Corporation Commission of Oklahoma. The protestants included the appellant, which complained because shipments to the Southeast were not treated equally with those to the Texas ports under the proposed rule; the New Orleans Joint Traffic Bureau, which was concerned with discrim-

[7] The proceedings before the Commission also involved *Investigation and Suspension Docket No. 4996, Loading Cotton on St. Louis, San-Francisco & Texas Railway Company in Texas*, instituted by order of July 28, 1941, which was heard and decided with *I. & S. Docket No. 4981*. (R. 1415; 248 I. C. C. 644) *I. & S. 4996* involved a proposal of the respondent therein to reestablish a loading charge in Texas. That case does not bear upon any of the issues involved in the instant case and will not be further considered herein.

mination against cotton shipped to New Orleans; the Mississippi Valley Interior Cotton Compress & Cotton Warehouse Association, which originally took a position similar to that of appellant, but later opposed any free loading whatsoever as an unreasonable practice (R. 27-28; 248 I. C. C. 651-2); and other railroads[8] which opposed the partial elimination of the unloading charge in Oklahoma for fear that free loading would spread into other cotton producing states. (R. 30; 248 I. C. C. 653)

C. THE CONTENTIONS OF THE RAILROAD PROPONENTS

The railroad proponents of the proposed change, appellees here, relied on the following matters as justifying the reasonableness of the proposed elimination of the loading charge on cotton reshipped to the Texas ports:

(1) The loading charge in Texas had been previously eliminated in order to meet truck competition, and some carriers believed that a prior order of the Commission[9] required the same loading privileges on Oklahoma cotton as on Texas cotton (R. 17; 248 I. C. C. 645); (2) the loading charge was considered a nuisance by shippers and was responsible for diversion of the tonnage to trucks (R. 116-7; 126), particularly as to cotton going from country origin to transit point (R. 128); and (3) the elimination of the loading charge would be helpful in meeting truck competition. (R. 17; 248 I. C. C. 645) The principal witness for the respondents before the Commission stated that the main purpose of the proposal was to stop the trucking of

[8] These include Guy A. Thompson, Trustee, Missouri Pacific Railway Company; J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company; St. Louis, San Francisco and Texas Railway Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees, The Chicago, Rock Island and Pacific Railway Company; and St. Louis Southwestern Railway Company.

[9] Finding No. 8, in *Cotton from and to Points in Southwest and Memphis*, (May 8, 1935), 208 I. C. C. 677, 732.

cotton from country stations to compress (transit) points[10] (R. 123-4), an excerpt from his testimony being quoted in the margin.

To excuse the difference in the proposed treatment of cotton shipped to the Texas ports, on the one hand, and cotton shipped to the Southeast, on the other, the respondents relied upon the following matters: (1) Other railroads objected to the elimination of the loading charge on cotton shipped to the Southeast which originated on the lines of respondents because of fear that the free loading would spread into Arkansas (R. 23; 248 I. C. C. 649); (2) there is no truck movement of cotton from Oklahoma to the Southeast (R. 23; 248 I. C. C. 649); and (3) the line-haul rates to the Southeast are lower relatively than to the Texas ports. (R. 23, 24; 248 I. C. C. 649).

D. THE CONTENTIONS OF APPELLANT

Appellant was not opposed to the elimination of the loading charge, provided all shippers, traffic, and localities were treated equally. That equality could be obtained either by the complete elimination of the charge or by applying a uniform charge on all cotton loaded at the shipper's

[10] In the following excerpt from the testimony we have made some slight changes in punctuation and have added the italics:

"Examiner Archer: * * * if this elimination of the loading charge is not going to have any effect at the compress points, I want to know that or want to get it clear in the record as to what effect it is going to have.

"The Witness: We can't stop right there, Mr. Examiner, because, in connection with cotton we give transit privileges and protect the through rate from the local gin origin to your final destination where we concentrate the cotton at the compress. In other words, as to the outbound movement, he can get his charges that he has paid into the compress refunded by filing a claim and retain protection on a through rate from point of origin; and every rate or rule or regulation which we can make available to the shipper * * * will encourage him to give us his cotton at the origin station, let us haul it into the compress point and then on out to destination. We will have a freight bill behind the cotton when it comes into the compress point which is of value to him to get a refund, and *that is what we want to do, and stop the trucking into the compress points as much as possible.*

"Mr. Belnap: *Is that the main purpose of this proposal?*

"The Witness: *Yes;* * * *."

request. Appellant's contentions were directed solely to the question of unjust discrimination and undue prejudice. It urged that the respondents had failed to show a dissimilarity in circumstances and conditions sufficient in fact or in law to remove the proposal from the statutory prohibitions against unjust discrimination and undue prejudice. Particularly, appellant contended:

(1) The free loading in Texas afforded no reason for the disparity, since free loading in Texas was not confined to cotton reshipped to the Texas ports but applied equally to the cotton reshipped to the Southeast. (R. 162; 168)

(2) The opposition of other railroads did not relieve the railroad appellees from the duty of treating all shippers equally, since the loading service and charge therefor is wholly local to such appellees and entirely within their control.

(3) The acute truck competition is in connection with the move from gin origin to compress point (R. 117, 126, 128); such competition is the same in the case of cotton subsequently reshipped to the Southeast as in the case of cotton subsequently reshipped to the Texas ports (R. 137); consequently, there is no dissimilarity in competitive conditions as a matter of fact. This is recognized by the "float-in" from the place of loading to the transit station, since identical "float-in" rates are provided on cotton which may be subsequently reshipped under transit to the Southeast as on cotton which may be subsequently reshipped under transit to the Texas ports. (R. 135-6)

(4) There was no evidence as to relative rate levels other than a mere statement of rates and distances[11] (Exhibits 32 to 39, inclusive, introduced at R. 274). Such evidence proves nothing when unaccompanied by proof as to

[11] Exhibit 38, which is typical of this evidence, is reproduced in Appendix B hereto.

relative operating conditions, relative costs of transportation, etc. In a prior proceeding on a comprehensive record, *Cotton from and to Points in Southwest and Memphis* (May 8, 1935), 208 I. C. C. 677, 717-719, the Commission held that the carload rates to the Southeast were not too low as compared with the rates to the Texas ports, the rate relation being at that time more favorable to the Southeast than at the time of the instant case.[12]

(5) The physical service for which the charge is assessed on cotton reshipped to the Southeast is identical with the physical service performed without charge if the cotton is reshipped to the Texas ports. In either case the work is performed by the station forces or section crews of the respondents (railroad appellees). (R. 24; 248 I. C. C. 649) The services being identical, Section 2 prohibits a difference in charges.

(6) As a matter of law, differences in the matter of relative line-haul rate levels cannot excuse the apparent violations of Sections 2 and 3(1), and differences in the matter of truck competition cannot excuse the apparent violation of Section 2. (See appellant's petition for reconsideration.) (R. 48-53)

(7) The difference in loading charges would constitute a serious disadvantage to appellant in buying and shipping cotton to the Southeast in competition with merchants who ship to the Texas ports. (R. 259-262)

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[12] In the prior case (1935), representative rates approved as not improperly related were shown from Oklahoma City to Houston, Texas, as 44 cents, minimum 75,000 pounds; 50 cents, minimum 50,000 pounds; 58 cents, minimum 25,000 pounds; and to Columbia, S. C., as 67 cents, minimum 50,000 pounds; 73 cents, minimum 35,000 pounds; and 82 cents minimum 25,000 pounds. Exhibit 38 in the instant case before the Commission (reproduced in Appendix "B" hereto) shows the present rates to Columbia are the same as the rates in 1935, but the present rates to Houston are on a lower basis i. e., 40 cents, minimum 65,000 pounds; 46 cents, minimum 50,000 pounds; and 54 cents, minimum 25,000 pounds.

E. THE REPORT OF THE COMMISSION, DIVISION 3

1. Recitals as to the contentions of the proponents

The report of the Commission deals with many general matters which have no pertinency to the issues presented in this appeal. Consequently, we confine the following summary of the report to those matters which this Court must consider in passing upon the questions of law presented.

The report notes that in a prior proceeding decided in 1935, referred to as the *Southwestern Cotton* case,[13] the Commission entered Finding No. 8 (R. 17; 248 I. C. C. 645), which required an equality of carload rates, distance considered, from all southwestern origins to Lake Charles, and to the Texas ports. In 1939, free loading was provided at Texas origins in order to meet truck competition. Regarding this situation, the report states (R. 17; 248 I. C. C. 645):

> "* * * Respondents claim that they are also confronted with motortruck competition, and by eliminating the loading charge in Oklahoma they can to some extent meet this competition and at the same time comply with the intended effect of finding 8 in the *Southwestern Cotton case.*"

And (R. 18; 248 I. C. C. 646):

> "* * * The territorial application as to destinations on traffic originating in Oklahoma, however, is not as large as the rule applicable in Texas, the Oklahoma rule applying only to Lake Charles, La., and the Texas ports."

As to the proof offered by the respondents relating to truck competition, the report states (R. 22-23; 248 I. C. C. 648-9):

> "* * * Reductions in through rates for the purpose of more adequately meeting truck competition were

[13] *Cotton from and to Points in Southwest and Memphis* (1935), 208 I. C. C. 677.

made applicable from the Southwest, including Oklahoma, on June 20, 1940, but the charge for loading in carload lots still annoyed the Oklahoma shippers, who continued to increase their deliveries to trucks throughout 1940. In 25 counties within the State of Oklahoma served by the Santa Fe for the season August 1, 1939, to July 31, 1940, there were 207,863 bales of cotton ginned. For this period, there were handled to compress points by the Santa Fe 27,758 bales and through from gin points to an interstate destination 18,179 bales, or a total of 45,937 bales, which is but 22.1 percent of the bales of cotton ginned. The balance of the cotton, 77.9 percent, was either handled by motortrucks or by other rail carriers. For the season August 1, 1940, to June 30, 1941, the latest for which data are available, there were 312,514 bales of cotton ginned in the same counties. The Santa Fe handled to compress stations 47,522 bales, and through from gin points to interstate destinations 15,352 bales, or a total of 62,847 bales, which is but 20.1 percent of the bales ginned. The remainder, 79.9 percent, was handled by motortrucks or by competing rail carriers.

"During the season 1939-40, there were 22,163 bales of cotton moved by motortruck from compress stations in Oklahoma. For the same period and from these same compress points the Santa Fe handled but 21,179 bales."

The reasons advanced by the respondents for not treating the Southeast the same as the Texas ports were summarized in the report, as follows (R. 23-24; 248 I. C. C. 649-50):

"The rule under suspension is restricted as to territorial application because of opposition of other lines. The reason for not providing for the absorption of the loading charge in Oklahoma on traffic destined to the Southeast is that the rates to the Southeast are already lower relatively than they are to the Texas ports. Besides, there is no trucking of cotton from Oklahoma to Memphis or to the Southeast. The average cost for complete loading by the rail carriers

would be a fraction less than 4 cents a bale, and this cost where labor is hired specifically for that purpose. Under present conditions the expense would be nominal, as the loading is accomplished by the local stations forces. In the case of a nonagency station, section crews are used. Respondents further point out that, when they perform the loading, the cars are loaded to their maximum capacity, resulting in decreased operating expense by eliminating car depreciation and switching and other expenses incidental to the handling of cars in the transportation of cotton. In the *Southwestern Cotton case* at page 691 it stated:

> " 'What the railroads are, or should be, seeking is to engage in the transportation of cotton under an arrangement which will net them the greatest possible revenue out of the depressed rates which the competition compels them to charge.'

"The competition with trucks in Texas was found to be greater to the Gulf ports than from Oklahoma points to the Gulf ports, but the competition with trucks at the country stations to the compress points is shown to be proportionately keen in both States. Regardless, however, of the fact that the rates to the Southeast are relatively lower than to the Texas Gulf ports, respondents stand ready to make the same free loading rule applicable from Oklahoma to such southeastern destinations. In the *Southwestern Cotton case* at page 718 it is stated:

> " 'It is conceded that the rates to southern mill points from Oklahoma are graded up very slowly as the distance increases, but such gradation is asserted to be necessary in order to prevent the cotton from being trucked to Arkansas compress points or river landings.' "

2. Recitals as to the contentions of the appellant.

The report mentions appellant in its first paragraph as one of those protesting the proposed change. Thereafter, the report of the majority makes no mention whatsoever of appellant, of its interest in the case, of the contentions advanced by it, or of the evidence offered on its

behalf. In the dissenting opinion of Commissioner Johnson, the following is said (R. 32-33; 248 I. C. C. 654-5):

> "I disagree with the views of the majority. In my opinion, cancelation of the loading charges at Oklahoma points by the respondents in I. and S. No. 4981 will result in preference of the Texas Gulf ports, Lake Charles, La., and west, and prejudice to New Orleans, La., Memphis, Tenn., and points in the Southeast. Although the report does not indicate that there is compelling truck competition to New Orleans, Memphis, and the Southeast, it does indicate that the largest truck movement in Oklahoma is from country points to the compress points. As it does not appear that trucks are hauling cotton from the compress points to New Orleans, Memphis, and the Southeast, it may be argued that the circumstances and conditions surrounding the transportation to those points are different from those governing the transportation to the Texas Gulf ports. However, the truck competition between the country points and the compress points is the same regardless of the destination of the cotton after compression. This being true, how can it be said that the purchaser of cotton at Memphis, for example, is at no disadvantage? Cotton is purchased at or near Muskogee, Okla., for L. T. Barringer & Company, of Memphis, for shipment to Kannapolis, N. C., in competition with those who purchase for shipment to the Texas Gulf ports. The cotton purchased for Barringer includes the loading charge, whereas that purchased for movement to the Texas Gulf ports will not. It is said that a difference in 5 cents a bale will make or lose a sale."

3. The findings of the Commission as to the pertinent facts

After reciting the contentions of the parties, other than the appellant, and summarizing the evidentiary facts relied upon by them, the report concludes with a statement of fact which is introduced by a phrase indicating that the Commission considered such facts to be controlling

upon the issues, that statement reading (R. 30-31; 248 I. C. C. 653-4):

"The pertinent facts are these: The carload rates on cotton from Oklahoma to the Gulf ports and the Southeast are conceded by all parties to be below a reasonable maximum level, yet at the same time compensatory. This is affirmed in the *Southwestern Cotton case*. Some carriers feel that they must do something to retain the cotton traffic on their lines. They are using the free-loading rule to assist them in retaining such traffic, and at the same time they are attempting to derive as much revenue as they can from the admittedly low level of rates now in effect on this traffic.

"The main concern of the carrier protestants is to prevent the spread of the free-loading rule, but we believe there has not been sufficient time to test the feasibility of this rule. Therefore, its adoption or rejection may be left to the discretion of all the carriers. The St. Louis, San Francisco & Texas Railway, respondent in I. and S. No. 4996, should have the same right to assess the loading charge on shipments of cotton originating on its lines in Texas as some of the Oklahoma carriers have who are not adopting the free-loading rule. The rates from the Texas origins are also upon a depressed level, and any of the rail carriers has the right to offset this discrepancy by any legitimate means. Evidently some believe the rule will be helpful while others do not. Some of the carriers in Oklahoma do not desire to waive the loading charge, and the same right of choosing one method or the other cannot be denied any of the Texas or Oklahoma carriers so long as there is no violation of the act in either State.

"In the *Southwestern Cotton case* the Commission, at page 724, said:

> "'The practices which may have prevailed in the past with respect to free transit are no criteria in the present circumstances. In the past there was substantially no unregulated competition and the rates were not depressed. If the carriers gave a free service in one instance it was not unrea-

> sonable to expect them to give it in another. Now the situation has changed. In the present circumstances it is not only the carriers' right but their duty to conduct their operations in the most economical manner possible, in order to retain the greatest net revenue out of the low competitive rates which they are compelled to charge. The fact that they have provided certain transit services without charge in addition to the transportation rates, in instances where that seems to be good business policy from a competitive standpoint, affords no basis for requiring them to assume the additional burden and expense incident to such services where the opportunities for corresponding benefits to them are lacking.'

"This was said with reference to the circumstances which distinguish the granting of transit in the interior but not at the ports. It applies with equal force to either of the situations presented in the proceedings now before us.

"'We therefore find that the elimination of the rail carriers' loading charge on cotton originating in Oklahoma on respondents' lines, compressed in transit, and moving from compress point to Texas Gulf ports and Lake Charles, La., at the carload rate from origin point, is just and reasonable and not shown to be otherwise unlawful."

4. The order of the Commission

Contemporaneous with its report, the Commission entered an order, of which the report was made a part, discontinuing the proceeding as of February 21, 1942. (R. 33) Before that order became effective, appellant filed with the Commission its petition for reconsideration which is reproduced in the record. (R. 35) That petition was denied by order of the entire Commission, dated April 13, 1942. (R. 6) As postponed from time to time, the order of Division 3 became effective April 21, 1942 and the railroad appellees made effective the change as authorized by the report and order on that date. (R. 6)

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred—

(1) In entering a general finding in which it adopted as its own the findings of fact of the Commission without specification of the language of the Commission considered by the court to constitute findings of fact;

(2) In concluding as a matter of law that the Commission made essential basic findings of fact in its report, and in failing to enjoin the order of the Commission on the ground that it is not supported by findings sufficient to disclose either the basic facts on which the Commission acted or a correct application of statutory standards;

(3) In concluding as a matter of law that the findings entered by the Commission are adequately supported by substantial evidence, and in failing to enjoin the order of the Commission on the ground that it is not supported by the evidence;

(4) In concluding as a matter of law that the Commission had the right to consider the dissimilarity in circumstances and conditions between the line-haul movement of cotton from Oklahoma origins to the Southeast and the line-haul movement of cotton from Oklahoma origins to the Gulf ports in determining whether the tariffs under investigation would result in violations of Sections 2 and 3(1) of the Interstate Commerce Act;

(5) In failing to enjoin the order of the Commission on the ground that its ultimate conclusion was predicated on circumstances which it was not legally entitled to consider as excusing the difference in charges complained of by appellant under Sections 2 and 3(1).

SUMMARY OF ARGUMENT

The loading charges and services at the Oklahoma stations here involved are within the sole control of the railroad appellees. These loading services are identical, regardless of the destination to which the cotton may be reshipped subsequent to the loading and subsequent to the initial haul from first origin to the transit (concentration) point. Appellant, a shipper of cotton to the Southeast, claims a right under the Interstate Commerce Act to equality of treatment as to such charges. That right to equal treatment is denied it by the order of the Commission.

The railroad appellees seek to excuse this inequality of treatment on the ground that (1) there is a difference in the matter of truck competition to the Southeast, as compared with truck competition to the Texas ports; and (2) the line-haul carload rates, applied under transit to the Southeast, are not as high as they should be in comparison with the line-haul rates applied under transit to the Texas ports.

While the Commission notes that these are the contentions of the appellees, its report neither contains any clear finding that such differences exist, nor does the report predicate the order on the existence of such differences.

Furthermore, there was no evidence tending to show that such differences existed as a fact.

Even if the report contained adequate findings supported by the evidence as to these matters, the order should nevertheless have been enjoined because, in that situation, it would be based on considerations which have no relevancy to the issues and upon standards which are not authorized by the statute.

The issue before the Commission was restricted to the

lawfulness of a difference in separately stated charges for identical loading services on like traffic. In such a case, Section 2 applies even though the destinations to which the cotton may be later reshipped after concentration-in-transit are different. Complete similarity as to all services received is not required in order to make Section 2 applicable to a case which involves only the separately stated charges for the loading services.

The alleged difference in the matter of truck competition and the alleged difference in the matter of the relative levels of line-haul rates do not constitute circumstances and conditions entitled to consideration upon the question of whether Section 2 prohibits a difference in separately stated charges for identical loading services. Consequently, an order predicated on such differences is beyond the authority of the Commission to make.

As to the issue under Section 3(1), the Commission had no right to conclude that a prejudicial difference in the matter of separately stated loading charges was not undue because the shipper so prejudiced enjoyed a relatively lower level of rates for line-haul transportation to the Southeast than was enjoyed by his competitors shipping to the Texas ports. The lawfulness of a separately stated charge for an accessorial service must be determined independently of other charges and services.

ARGUMENT

I.

THE ORDER OF THE COMMISSION IS NOT SUPPORTED BY THE FINDINGS IN THE REPORT

Appellant claims a right under Section 2 to an equality in the charges for loading. It also claims a right under Section 3(1) to be free from undue prejudice. When a proposed destruction of the existing equality of charges is in issue at a full hearing pursuant to Section 15(7), the Commission is not authorized to approve the proposal as lawful except upon considerations authorized by the governing statute. Such approval is unsupported, insofar as Section 2 is concerned, unless predicated (a) on a finding that the traffics are unlike; (b) on a finding that the services are unlike; or (c) on a finding that the services are performed under substantially dissimilar circumstances and conditions. As to Section 3(1), such approval is valid only if supported by a finding that the prejudice, which plainly results, is excused and consequently not undue, because of particular considerations to be stated in the report. In the case of Section 3(1) the nature of the considerations which might support the ultimate conclusion cannot be stated with the same precision as in the case of Section 2 because Section 3(1) is phrased in broad language while Section 2 specifies the matters which Congress intended to be controlling upon the application of that section.[14]

[14] In *R. R. Commission of Geo. v. Clyde Steamship Co. et al.* (1892), 5 I. C. C. 324 (4 I. C. R. 129), at pages 374-5, the Commission said:

"This undue preference clause may justly be termed an omnibus provision, enacted first by Parliament and then by Congress, to prohibit carriers from doing any act which unduly or unreasonably puts one shipper or description of traffic up in the scale of favor or puts another shipper or description of traffic down to his or its disadvantage or wrong. But when the Act to regulate commerce was

In the absence of such findings, there is no disclosure that the Commission applied the authorized statutory standards rather than some undefined standards of its own. An order of an administrative agency, which is not supported by findings sufficient to disclose a correct application of statutory standards, is void and must be enjoined. It was so held in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506, involving an order entered in a suspension case, and in *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, involving the denial of a right claimed under the Interstate Commerce Act.

The ultimate conclusion of the Commission is that the proposed change "is just and reasonable and not shown to be otherwise unlawful."[15] (R. 32; 248 I. C. C. 654) The concluding phrase is the equivalent of a finding that "the proposed change is not shown to be in violation of or prohibited by Section 2 or Section 3(1)." The vice of the report is that such an ultimate conclusion is not supported by preliminary findings as to the matters noted in the first paragraph under this heading.

The concluding portion of the report, which contains findings upon the facts characterized by the Commission as "pertinent," (R. 30-32; 248 I. C. C. 653-4) completely ignores the difference in charges complained of by the

passed Congress not only adopted that clause but saw fit to go further and specify that certain charges by the carrier would in themselves constitute wrong. The second and fourth sections of the Act—that is, the unjust discrimination and long and short haul clauses—are provisions of this character. * * * These provisions describe the offence and limit the circumstances and conditions to be considered to those under which the transportation is conducted."

[15] Earlier in its report, and immediately before the paragraph which begins "The pertinent facts are these," the Commission said (R. 30; 248 I. C. C. 653): "* * * from the evidence presented in the instant proceedings it has not been shown that any provisions of the Interstate Commerce Act would be violated if the suspended Oklahoma rule is permitted to become effective."

appellant and contains no finding to dispose of the controversy as to whether there is in fact a difference in circumstances and conditions which takes the case out of Sections 2 and 3(1); nor do any of the recitals contained in the preceding paragraphs of the report contain such findings.

The two dissimilarities relied upon by the railroad appellees relate to (a) an alleged difference in truck competition, and (b) an alleged difference in the levels of the respective carload rates for line-haul services. As to neither of these alleged differences does the report contain a simple, clear finding offered as a predicate for the ultimate conclusion.

Truck competition. The recitals in the report as to truck competition are to be considered in the light of the place at which the loading service is performed, and in the light of the portion of the through service which encounters the truck competition. The tariff in issue relates to a loading service only at the gin origin at the inception of the gin-to-compress portion of the through service.[16] Loading at the compress point, either free or for a charge, is not involved. (R. 122-3) The intense truck competition is encountered in connection with the gin-to-compress move. That competition is not affected by the ultimate destination to which the cotton may be later reshipped from the compress and is encountered equally if the cotton is subsequently reshipped to the Southeast or if the cotton is subsequently reshipped to the Texas ports. (R. 137; 32-3; 248 I. C. C. 654) See map at back of this brief.

With this background, we note the Commission's recitals: First, a statement of the cotton tonnage secured by the Santa Fe Railroad from twenty-five counties in Oklahoma

[16] The tariff provisions which make this plain are reproduced in Appendix "C" hereto.

in comparison with the cotton tonnage produced therein, the balance moving "by motortruck or by other rail carriers." (R. 22, 23; 248 I. C. C. 648-9) This is not a finding of differences in conditions as between cotton shipped to the Southeast and cotton shipped to the Texas ports. It is not even a clear finding as to truck competition as distinguished from competition with the other respondents in the case before the Commission.

Second, a statement that in the 1939-40 season "22,163 bales of cotton moved by motortruck from compress stations in Oklahoma," which is shortly followed by a statement that "there is no trucking of cotton from Oklahoma to Memphis or to the Southeast." (R. 23; 248 I. C. C. 649) While this statement implies a difference in conditions, the statement relates to trucking out of compresses. Consequently, it is not a finding relevant to the real issues which involve the loading service and charge at the gin origin at the inception of the gin-to-compress move.

Third, the report states: "The competition with trucks in Texas was found to be greater to the Gulf ports than from Oklahoma points to the Gulf ports but the competition with trucks at the country stations to the compress points is shown to be proportionately keen in both States." (R. 24; 248 I. C. C. 649) This is not a finding as to a difference in conditions as between cotton shipped to the Southeast and cotton shipped to the Texas ports.

These are all the recitals in the report which even remotely relate to the point under discussion. No one of them supports the order insofar as the issues under Sections 2 and 3(1) are concerned.

Relative line-haul rate levels. Assuming, *arguendo*, that relative rate levels are entitled to consideration as a relevant circumstance in this case, the theory must be

that cotton to the Southeast is not paying as much for line-haul transportation services as it ought to pay if properly related to the line-haul rates to the Texas ports, all transportation conditions which affect line-haul transportation being considered; consequently, that the addition of a loading charge on cotton to the Southeast (from which cotton to the Texas ports is free) will not result in a relation of aggregate charges which is unfair to the Southeastern movement. Leaving the relevancy of this theory to be considered below, we now show that the theory is not supported by any finding in the report.

The Commission does state:[17] "Regardless, however, of the fact that rates to the southeast are relatively lower than to the Texas Gulf ports, respondents stand ready to make the same free loading rule applicable from Oklahoma to such southeastern destinations."[18]

This is not a finding; rather it is a recital of a railroad contention. Even if treated as a finding, it is without significance. The rates to the Southeast are actually higher in cents per hundred pounds than to the Texas ports. (See Exhibit 38 reproduced in Appendix "B" hereto.) In view of that circumstance, there is nothing in the report which discloses what the Commission meant by using the words "relatively lower." The report does not disclose the standard used to measure the relation. While a finding that cotton to the Southeast does not pay as much for line-haul service as it ought to pay in relation to the Texas ports would have a definite meaning, the words "relatively lower" convey no meaning, insofar as any issue

[17] With a substitution of the word "southwestern" for the word "southern" this sentence is taken verbatim from page 27 of the Argument in the brief of the railroad respondents before the Commission. (Plaintiff's Exhibit 4 in the District Court, which is covered by the stipulation not to print.)

[18] Despite this statement, the respondents (railroad appellees) have not provided free loading to the Southeast, although they have power to do so any time they desire.

in this case is concerned. Something more precise is required.

The statement quoted from the report is meaningless as a finding for still another reason: The report does not connect it in any way with the issues involved under Sections 2 or 3(1) of the Act, or with the ultimate conclusion of the Commission on such issues. Before a finding can be treated as in support of an ultimate conclusion, some relation between the two must be disclosed.

It cannot be said here, as in other cases, that the report contains findings which are definite and comprehensive. *Alabama* v. *United States*, 283 U. S. 776, 779; *Georgia Pub. Serv. Commission* v. *United States*, 283 U. S. 765, 773; nor can it be said that appellant demands an impracticable exactness, *Florida* v. *United States*, 292 U. S. 1, 9, or that there was any administrative difficulty in making clear, simple, and precise findings on the issues, *United States* v. *Louisiana*, 290 U. S. 70, 78. Nor can appellant be charged with contending that the Commission is required to disclose the detail of the mental operations by which its decisions are reached, *Baltimore & O. R. Co.* v. *United States*, 298 U. S. 349, 359 or that the Commission is required to frame its findings in a formal manner, *United States* v. *Louisiana*, 290 U. S. 70, 80.

Appellant only urges that an order of the Commission cannot be sustained unless it discloses the basic facts on which predicated, and that this Court is not required to search the record or to indulge in implications in order to supply essential findings which are otherwise lacking. *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193, 201-2.

In Finding No. 23 (R. 83), the District Court adopted as its own the findings of fact in the report of the Com-

nission. The District Court did not, however, identify the anguage in the report which it so adopted.

Finding No. 24 of the District Court (R. 83) reads:

> "The Commission found, *inter alia*, that there is (1) no trucking of cotton between points in Oklahoma and the Southeast, whereas there is trucking of cotton between points on Oklahoma and the Gulf ports, (2) that the carload rates on cotton from Oklahoma origins to the Southeast are on a relatively lower basis than the carload rates on cotton from the same origin to the Gulf ports, and (3) that the rates from points in Oklahoma both to the Southeast and to the Gulf ports are depressed."

The foregoing statement evidences the same lack of precision as the statements in the report of the Commission commented upon above. Additionally, it is erroneous to characterize the statement of the Commission regarding the relation of the carload rates as "a finding"; rather, it is a mere recital of a railroad contention.

II.

THE ORDER OF THE COMMISSION IS NOT SUPPORTED BY THE EVIDENCE

The undisputed evidence shows: (1) a difference in the charges for loading as between shippers of cotton to the Southeast and shippers of cotton to the Texas ports; (2) identical loading services for both shippers as to the place where performed and as to the method of performance; (3) immediately after loading, identical moves via the lines of the railroad appellees at the same "float-in" rates from the gin origin to the concentration (compress) point (R. 135-6); and (4) a disadvantage imposed on appellant and a corresponding advantage conferred on its competitors in the buying and shipping of cotton which flows

directly from the assailed difference in the loading charge. (R. 259-262)

In such a case, this Court could well say, as it did, in *Mitchell v. United States*, 313 U. S. 80, 90, there is no room for administrative judgment, and the appellant is entitled to the protection of the statute which forbids the conduct of which it complains.

Passing for later consideration the question of the legal significance of the differentiating circumstances relied upon by appellees, we now consider them from the standpoint of the evidence.

Truck competition. Appellant admits that the evidence supports the recitals as to truck competition quoted from the report under Point I above. However, since such recitals and evidence do not show a difference between the cotton handled from gin to compress which is later reshipped to the Southeast, on the one hand, and the cotton handled from gin to compress which is later reshipped to the Texas ports, on the other hand, such evidence affords no support for the order.

Relative line-haul rate levels. In the course of his cross, although not in his direct, examination, the principal witness for the respondents before the Commission said (R. 137):

> "Insofar as the justification of it is concerned, there is another justification for not doing it—that is, the rates to the Southeast are already lower, relatively, than they are to the ports."

This witness did not elaborate on the casual statement just quoted.

After the respondents had concluded their case in chief and the protestants had been heard, the respondents called another witness who offered Exhibits 32 to 39, inclusive.

(introduced and described at R. 269-73) which consisted of maps and comparative statements of distances, rates, earnings per ton mile and per car mile from Oklahoma origins to Houston, Texas, and to Southeastern destinations. As representative of these, Exhibit 38 is reproduced in Appendix "B" hereto. The witness pointed to the fact that these exhibits showed that the rates for the longer hauls to the Southeast produced lower earnings in mills per ton mile or in cents per car mile than the rates for the shorter distances to Houston, although the latter rates are much the lower in cents per hundred pounds. The witness also made a categorical statement that these comparisons indicate "a much lower level of rates to the large consuming portion of Southern territory." (R. 271)

The record contains no other evidence bearing upon the question of relative levels of line-haul rates, and the District Court so found.[19] (R. 82) The Commission has many times held that rates for longer distances should properly yield lower earnings per mile than rates for shorter distances[20] and that a bare rate comparison which shows nothing but rates and distances is without probative value,

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[19] The finding of the District Court reads: "The evidence before the Commission was confined to a comparison of the rates, distances, ton-mile earnings, and car-mile earnings involved, and no evidence was offered as to the specific costs of the respective line-haul services or as to any transportation circumstance and condition incident to line-haul services other than the mere matter of distance."

[20] "It is a well-recognized principle of rate making that as distance increases ton-mile earnings decrease." *Magee Carpet Co.* v. *C. R. R. Co. of N. J.* (1928), 144 I. C. C. 281, 282. "It is proper that car-mile revenue should increase generally as distance decreases." *Consolidated Cottonseed Co.* v. *Arkansas & M. Ry. B. & T. Co.* (1932), 182 I. C. C. 12, 13. See also *Montana Horse Products Co.* v. *Atchison, T. & S. F. Ry. Co.* (1934), 203 I. C. C. 681, 686; *Cattle Raisers' Asso. of Tex.* v. *M., K. & T. Ry. Co., et al.* (1908), 13 I. C. C. 418, 426; *Boxes or Cartons, Indiana and Michigan to W.T.L. Points* (1937), 222 I. C. C. 91, 95.

R. R. Commission of Geo. v. *Clyde Steamship Co. et al.* (1892), 5 I. C. C. 324 (4 I. C. R. 120), 376:

"• • • To charge less per mile for greater distance is a common rule of transportation, and its legality is well settled."

particularly when the rates apply in different territories.[21] Any test of rates as to measure or relation involves many factors, including the cost of the service, as well as other transportation conditions, and cannot be disposed of by a categorical statement, *United States* v. *Illinois C. R. Co.*, 263 U. S. 515, 524; *Interstate Com. Com.* v. *Union P. R. Co.*, 222 U. S. 541, 549.

In the absence of any evidence other than a bare statement of rates and distances, the Commission was not in a position to come to any conclusion, one way or the other, as to whether the rates to the Southeast were either higher or lower than they should be in relation to the rates to the Texas ports. *Alton & S. R. Co.* v. *Illinois Commerce Commission* (1925), 316 Ill. 625, 147 N. E. 417. We do not ask this Court to substitute its judgment for that of the Commission as to how this rate relation appears; we do ask this Court to find that there was no evidence to support any finding on the point.

Assuming this Court agrees with us as to the lack of evidence on one of these matters and disagrees with us as to the lack of evidence on the other matter, the order should nevertheless be enjoined. The lawfulness of rates and charges depends on many elements and facts. If the Commission erred as to one factor only on which it relied in its final determination, this Court is not in a position to say that the Commission would have come to the same ultimate conclusion if that factor be laid aside from view.

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[21] "Comparisons with other coal rates are of value only if supported by comparisons of operating conditions, and they are not so supported in this case." *Mutual Coal, Light & Power Co.* v. *A., T. & S. F. Ry. Co.* (1934), 205 I. C. C. 243, 252. "Other comparisons, based on distances alone, were introduced. We have repeatedly pointed out that such comparisons have slight probative value." *Burge-Doyle Live Stock Co.* v. *A. T. & S. F. R. R. Co.* (1924), 87 I. C. C. 319, 320. See also *Bos Sand Co.* v. *A., T. & S. F. Ry. Co.* (1926), 112 I. C. C. 121, 123; *Smith & Co.* v. *Chicago & A. R. Co.* (1921), 171 I. C. C. 605, 607; *Mayer & Co.* v. *C., M. & St. P. Ry. Co.* (1922), 69 I. C. C. 519, 521; *Nebraska Seed Co.* v. *Director General* (1921), 64 I. C. C. 75, 77.

If this Court were so to hold, it would be akin to substituting the judgment of this Court for that of the administrative body in that this Court would be announcing what the administrative body should conclude as a fact before the administrative body speaks. *Interstate Commerce Commission* v. *Clyde Steamship Co.*, 181 U. S. 29, 32-3.

Consequently, if this Court finds that there is no support in the evidence as to any item which was relied upon by the Commission, appellant respectfully suggests that the appropriate procedure would be to set aside the existing order so that the Commission might have an opportunity to express its administrative judgment upon the basic facts when limited to those which are entitled to its consideration.

III.

THE ORDER OF THE COMMISSION IS BASED UPON CONSIDERATIONS NOT LEGALLY RELEVANT TO THE ISSUES AND UPON STANDARDS OF LAWFULNESS NOT AUTHORIZED BY THE STATUTE.

For the purpose of considering what conditions and circumstances were legally entitled to consideration by the Commission, we will assume, *arguendo*, (a) that the report contains a finding that the cotton reshipped by appellant to the Southeast is subject to a different degree of truck competition for the move out of the gin origin than the cotton reshipped by its competitors to the Texas ports; (b) that the report contains a finding that the line-haul rates to the Southeast are not as high as they ought to be if properly related to the line-haul rates to the Texas ports; (c) that the assumed findings are presented in the report as the predicate for the ultimate conclusion; and (d) that the evidence supports the assumed findings. The question remains whether these are dissimilarities which the Com-

mission was legally entitled to consider in this case, in which the only issue is as to the lawfulness of a proposed change in the charges for a loading service.

A. THE MATTERS ENTITLED TO CONSIDERATION UNDER SECTION 2 ARE LIMITED TO THOSE WHICH RELATE DIRECTLY TO THE LOADING SERVICE AND TO CHARGES THEREFOR.

Section 2 of the Act prohibits unjust discrimination as between shippers and, at the same time, defines with precision the facts which must be present in order to render the discrimination *unjust*. That section leaves to the determination of the Commission only the question of whether a particular situation is embraced as a fact within the prohibition. In this respect it is different from other sections of the Act which do not define what constitutes an unreasonable or a prejudicial rate. Unjust discrimination is defined as the charging of one person more than another person for "a like and contemporaneous service in the transportation of a like kind of property under substantially similar circumstances and conditions."

By its own terms, Section 2 operates within a very narrow field. The very narrowness of that field leaves little room for administrative discretion. Once the Commission has made findings as to the basic facts, Section 2 either applies or does not apply to a case showing a difference in charges, dependent upon whether the findings announce similarities or dissimilarities in the controlling circumstances and conditions. The question of whether a particular dissimilarity is within the meaning of the statute is a question of law for this Court to decide and not a question of fact as to which the judgment of the Commission is final. *Mitchell* v. *United States*, 313 U. S. 80; *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42; *Interstate Commerce Commission* v. *B. & O. R. Co.*, 145 U. S. 263.

1. A difference in charges for identical loading services at the inception of the "float-in" move is not taken out of Section 2 by a difference in the destinations to which the cotton is subsequently reshipped from the concentration points.

In the District Court the appellees contended that the difference in the destinations to which the cotton is reshipped after concentration makes Section 2 wholly inapplicable to this case. If that contention be sound, then appellant has no case under Section 2, and it would be unnecessary to consider whether the other alleged dissimilarities are legally entitled to consideration.

Appellant urges that the contention is not sound for the following reasons:

(1) Section 2 is recognized as modeled on Section 90 of the English Railway Clauses Consolidation Act of 1845, 8 & 9, Vict., ch. 20, known as the "Equality Clause," which is reproduced on page 54 of Appendix "A" hereto. *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235, 253-5. Yet there is a fundamental difference in phraseology between the two statutes which plainly evidences an intent on the part of Congress to have Section 2 apply independently to all separately stated accessorial services and charges, such as loading, despite a complete dissimilarity in the matter of the line-haul services. The prohibition against unequal charges in the English statute is restricted to charges on goods "conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway." Congress did not so narrow Section 2; rather it made Section 2 applicable to a difference in charges for "any service rendered, or to be rendered, in the transportation of property," subject only to the general limitation that the services be "like" and be rendered under "substantially similar circumstances and conditions."

In *R. R. Commission of Geo.* v. *Clyde Steamship Co. et al.* (1892) 5 I. C. C. 324 (4 I. C. R. 120) at page 375, the Commission said:

> "Considerable variation in language is also found in comparing the English equality clause of 1845 with the second or unjust discrimination clause of our law. That the latter covers much more ground must be apparent to the casual observer, * * *."

And at page 377, said:

> "* * * Section 90 of the 1845 statute, in its proviso required equality when the carriage is over the *same portion of the line* under the same circumstances. Section 2 of our Act only requires the traffic to be like, the service to be like and contemporaneous, and the transportation under *substantially similar* circumstances and conditions. The provisions are so different in terms that the same set of facts might constitute immunity under the English provision and guilt under our law."

By reason of this difference, the English cases which involve a claim of unjust discrimination in charges for identical accessorial services also show identical line-haul services in order to meet the requirement of "passing only over the same portion of the line of railway"; whereas the cases in which the Commission has required identical line-haul services as a predicate for an application of Section 2 are limited to those in which the charges in issue were assessed for the movement of traffic from one point to another. In such cases, the Commission repeatedly notes that Section 2 is inapplicable unless the traffic is moved over the same tracks in each case since, otherwise, the circumstances and conditions directly governing the services for which the unequal charges are assessed could not be similar.

However, when the charges assessed are for services other than the movement of traffic over tracks from one

point to another, the Commission holds separately established charges for accessorial services "must stand or fall as such" and that Section 2 applies even though there is a difference in the points from or to which the traffic moves and in the routes by which the service is performed. *Birkett Mills* v. *D., L. & W. R. R. Co.* (1927), 123 I. C. C. 63, 65. Such a construction and application of the statute is required to carry out the intent of Congress as plainly indicated by the language of Section 2. Certainly, there are no words in that section nor anything in its legislative history to suggest that it applies to separately stated accessorial services and charges *only* when the aggregate services are identical.

If it be true that Section 2 applies to a difference in charges for identical accessorial services only when the line-haul services are likewise identical, a preliminary finding to the latter effect would be jurisdictional whenever a Section 2 order is issued; yet in *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 511, this Court sustained an order of the Commission based on a finding of unjust discrimination in the matter of loading services and charges although the report of the Commission (*Gallagher* v. *Pennsylvania R. Co.* (1929), 160 I. C. C. 563) completely ignored the matter of the line-haul services.

In *Wight* v. *United States*, 167 U. S. 512, this Court emphasized the fact that the shipper who was unjustly discriminated against in the matter of drayage at destination also received the same line-haul service as that given to the shipper receiving the free drayage. However, that case does not hold that there must be identical line-haul services in order to make Section 2 applicable to a case such as this in which the tariffs provide a separately stated terminal charge on the traffic of one shipper but not on the traffic of another shipper, both receiving identical terminal services. Properly considered, the discrimination in the *Wight* case

resulted from the fact that in neither instance did the tariff provide for the terminal service, yet it was accorded one shipper and denied another. Today, that would be a rebate punishable under the Elkins Act (Title 49, U.S.C. Sec. 41-43) enacted subsequent to the *Wight* case.

(2) Section 1(3)(a) defines "transportation" as including "all services in connection with the receipt * * * and handling of property transported". Section 6(1) requires carriers to state separately all terminal charges. This further evidences the intent of Congress to have the lawfulness of each individual terminal charge considered on its own merits regardless of what other services may be performed by the same or other carriers on the same shipment.

(3) In cases involving Section 2 as applied to charges for line-haul services, this Court has consistently held that the circumstances legally entitled to consideration do not include "differences in circumstances arising either before the service of the carrier began or after it was terminated." *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235, 253-4; *Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 225 U. S. 326, 342-3. There is no logical reason why that construction of the statute should be confined to a case involving charges for line-haul services and not extended to a case involving charges for terminal services, such as loading. In either case, the conditions legally entitled to consideration should be restricted to those which relate to the service for which the charges apply. The prohibition of the statute runs against the collection of a different charge from one person than from another person "for *any* service rendered, or to be rendered, in the transportation of * * * property." The phrase "under substantially similar circumstances and conditions" exhausts itself upon the particular services for

which the charges are assessed, and does not embrace other services separated therefrom.

The injury of which appellant complains is a direct result of a difference in the charges for identical loading services. It claims a right to have the Commission forbid the conduct of which it complains. The appellee railroads cannot escape the application of Section 2 to the loading charges and services because at some subsequent time other carriers which have no control over the loading services and charges and do not participate therein, but which participate with the appellees in the through line-haul move, transport the traffic in line-haul services to a variety of destinations. (See map at back of this brief.)

(4) The issue in the case as framed by the order instituting the investigation requires the application of Section 2 (as well as Section 1(5)(a) and Section 3(1)) to the loading charges and services independent of all other charges and services.

If Section 2 is inapplicable to the case presented by the appellant because the destinations are different, then the aggregate charges for the line-haul services plus the loading services must have been in issue so as to be subject to such order as the Commission might find to be required under the facts. But the line-haul services and charges were not in issue before the Commission, nor did the respondents before the Commission include the connecting railroads of the appellees which make up the through routes to the Southeast. It thus appears that there was no issue under which the Commission could have dealt with the lawfulness of the aggregate of line-haul charges and of loading charges, even if it had so desired. The Commission had authority to deal only with the separately stated loading charges and services and could compel obedience to statutory standards of lawfulness only by the railroad appellees,

which alone were responsible for the difference in charges of which appellant complains. *Central Railroad Co. of New Jersey* v. *United States*, 257 U. S. 247.

If appellees are right as to the proper construction of Section 2, appellant had no rights whatsoever in the case, regardless of the proof, and the Commission was powerless to enforce that equality of treatment which the statute commands. But the statute should not be construed as self-destructive.

(5) Section 2 by its terms applies to a difference in the charges assessed "for *any service* rendered, or to be rendered." In this respect it is like Section 1(5)(a) which relates to the reasonableness of the charges "made for *any service* rendered or to be rendered." In a case arising under Section 1(5)(a), this Court held that the lawfulness of a terminal charge must be tested by an independent consideration of that charge and the service to which it applies, without combining that charge and service with the line-haul charge and service. *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, 105, 109. Insofar as the propriety of testing the lawfulness of a separately stated terminal charge independently of the line-haul services is concerned, the instant case cannot be distinguished from the case cited since there is no reason to construe "any service" in Section 2 differently than in Section 1(5)(a).

(6) In *Central Railroad Co. of New Jersey* v. *United States*, 257 U. S. 247, a Section 3(1) case involving an accessorial service (creosoting-in-transit), the Commission found that undue preference and prejudice was occasioned by the maintenance of the transit privilege at some points and not at others. Certain connecting carriers in the joint through rate structure, which did not maintain the privilege at their own stations, sought to enjoin the order on the ground that the mere fact of their participation in the

through rates did not make them responsible for preference and prejudice growing out of the privileges maintained by and on other lines. This Court agreed with that view and held that the Commission erred as a matter of law in treating such a service, local to the line performing it, as an integral part of the joint line-haul service. To couple the accessorial service with the line-haul services in the instant case, which must be done if a difference in destinations serves to take the case out of Section 2, would be contrary to the principle of the case cited.

2. The alleged difference in the relative levels of the through line-haul rates, and the alleged difference in the matter of truck competition, did not constitute a dissimilarity of circumstances and conditions within the meaning of Section 2.

If Section 2 applies in this case, regardless of the difference in ultimate destinations, the question still remains as to whether the service of loading on the cotton subsequently reshipped to the Southeast is performed under substantially similar circumstances and conditions as on cotton subsequently reshipped to the Southeast. That presents a question of fact as to the existence of any particular circumstance showing a similarity or a dissimilarity. It is a question of law as to what circumstances are entitled to consideration.

All parties will concede that there is no difference in the physical services rendered in the loading of the cotton. Furthermore, the initial move of the cotton to concentration point is the same service on the same "float-in" rate, regardless of the ultimate destination to which the cotton may be subsequently reshipped after the concentration and compression. (R. 135-6) The identical "float-in" services depicted on the map at the back of this brief are from Lindsay (country origin) to Paul's Valley (transit point).

The railroad appellees claim, as the Commission alleges in paragraph X of its answer in the District Court (R. 59), that controlling dissimilarities do exist in the matter of the relative levels of the through line-haul rates applied under transit and in the matter of competition with motor-truck service. The lower Court held in its fourth conclusion of law (R. 84) that the Commission had properly considered these dissimilarities under both Sections 2 and 3(1). Appellant submits that neither of these alleged dissimilarities is legally entitled to consideration under Section 2.

It is well settled and no longer open to question that a difference in the matter of competition with another transportation agency is not entitled to consideration as a dissimilarity of circumstances and conditions within the meaning of Section 2. *Wight* v. *United States,* 167 U. S. 512, 518; *Interstate Commerce Commission* v. *Alabama M. R. Co.,* 168 U. S. 144, 166; *Seaboard Air Line Railway Co.* v. *United States,* 254 U. S. 57, 62. The Commission has repeatedly recognized and applied this rule in other cases involving separately stated terminal charges and services. *Drayage Absorptions by S. W. M. R. R. Co.* (1926), 113 I. C. C. 179, 185; *Absorption of Loading Charge* (1930), 161 I. C. C. 389, 391-2; *Allowance for Driving Horses at Miles City, Mont.* (1938), 227 I. C. C. 387, 389.

The effect of these cases and of the other cases in which this Court has construed Section 2, (*Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.,* 220 U. S. 235, *Interstate Commerce Commission* v. *B. & O. R. R. Co.,* 225 U. S. 326) is that no circumstances and conditions extraneous to the services for which the charges in issue apply may be relied upon as showing a dissimilarity within the meaning of Section 2. The only conditions and cir-

cumstances legally entitled to consideration must relate directly to the service in issue. What happens to the goods or to the shipper before or after that particular service is rendered cannot serve to justify a difference in charges. Consequently, a difference in line-haul charges incurred upon the reshipment from the transit point is not legally entitled to consideration.

Apart from the authorities above cited, there is no logical basis on which to support the view that a difference in the relative levels of the through line-haul rates is sufficient to excuse discrimination in the charges assessed for the loading services. The charges for line-haul services incurred when the cotton is reshipped and a transit settlement claimed have no relation to, or connection with, the charges for the loading services. Many carriers participate in and control such line-haul services; only the railroad appellees participate in and control the loading services and charges. Whether the connecting carriers, in participating with the appellees, charge too much or too little for line-haul services cannot affect the right of the railroad appellees to exact reasonable compensation for any separate terminal service performed solely by them. *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, 105, 109. However, that right is accompanied by an obligation to charge equally. While the reasoning of the *Stickney* case was squarely directed to the independence of the right, the principle thereof is equally applicable to the independence of the obligation. The acts of the connecting railroads cannot serve to modify the obligation any more than such acts can serve to modify the right. *Central Railroad Co. of New Jersey* v. *United States*, 257 U. S. 247. Compare *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U. S. 768, 779.

In concluding as to Section 2, appellant suggests that

there would be no real difference between that section and Section 3(1) if the lower Court were right in adopting the construction of Section 2 urged upon it by appellees. However, properly construed, these sections are quite different in respect to the matters entitled to consideration in determining issues presented thereunder. As was said by Lord Herschell in *Phipps* v. *N. & W. R. Co.* 2 Q. B. 229, 249, with reference to the corresponding provisions in the English Statute:

> "The words of the equality clause have no elasticity at all; there are no outside circumstances to be taken into consideration, and it is not a question of regarding the position of one trader as compared with the other, and then saying whether there is any undue preference.[22] It is an absolute rigid equality which is demanded by the statute."

B. THE LAWFULNESS UNDER SECTION 3(1) OF SEPARATELY STATED TERMINAL CHARGES FOR LOADING MUST BE TESTED INDEPENDENTLY AND WITHOUT MERGING THEM WITH THROUGH RATES FOR LINE HAUL TRANSPORTATION.

This Court has recognized that competition with other carriers may serve to justify a relation of rates which otherwise would appear to be unfair and prejudicial under Section 3(1). *Interstate Commerce Commission* v. *Alabama, M. R. Co.*, 168 U. S. 144, 166. Consequently, appellant's claim of error involving the Commission's consideration of the alleged difference in truck competition is restricted to its disposition of the case under Section 2.

In the case of the Section 3(1) issue, the error of the Commission in statutory construction and application rests on the fact that, according to its counsel and to the rail-

[22] The undue preference provision in the English Statutes (Sec. 2 of the Act of July 10, 1854, for the better regulation of traffic on railways and canals, 17 and 18 Vict. c. 31; and Sec. 11 of the English Act of July 21, 1873, 36 and 37 Vict. c. 48) is phrased in broad terms similar to Section 3 in the Interstate Commerce Act.

road appellees, it considered the disparity in the loading charges as justified by the alleged difference in the relative levels of the through line-haul rates.[23] Such line-haul rates have no relation to the loading charges. As stated, the line-haul rates to the Southeast are maintained by the railroad appellees in participation with many other connecting carriers. The connecting carriers have no control over, or interest in, the loading services and charges of the railroad appellees, except by way of comparison with their own services and charges. Appellant is entitled to be free of the undue prejudice which is caused by the railroad appellees alone, regardless of whether the connecting carriers participated with such appellees in charging too much or too little for the line-haul services which they perform to the Southeast. *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98.

The error here is the converse of that found in *Central Railroad Co. of New Jersey* v. *United States*, 257 U. S. 247. To make this plain, assume that the line-haul rates to the Southeast were higher than they should be as compared with rates to the Texas ports, and that the railroad appellees insisted on maintaining an equality of separately stated charges for loading services to both destination territories. Further assume that the appellant sought and obtained from the Commission an order under Section 3(1) requiring the railroad appellees to load the cotton free when reshipped to the Southeast, but not to the Texas ports, in order to provide appellant with *aggregate* charges properly related to those of its com-

[23] In order to present argument on this point, appellant must assume, *arguendo*, that the ultimate conclusion of the Commission is predicated on the alleged difference in relative levels of line-haul rates as contended for by the appellees. However, the report of the Commission does not plainly disclose any such predicate for its ultimate conclusion.

petitors shipping to the Texas ports. Such an order would be plainly bad, since it would deprive the railroad appellees of their right to control all charges for local services performed by them, independently of their participation in joint rates for line-haul services. The disposition of this case by the Commission under Section 3(1) is equally inconsistent with the recognition of that right.

CONCLUSION.

Appellant respectfully submits that the decree of the District Court should be reversed and the case remanded with directions to enter the injunction as prayed for.

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Counsel for Appellant

February, 1943.

APPENDIX "A"

STATUTES CITED.

Part I of the Interstate Commerce Act.

SECTION 1(1)(a) (TITLE 49, U.S.C., SEC. 1(1)(a)).

"(1) That the provisions of this chapter shall apply to common carriers engaged in—

"(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment;

* * * * * *

"* * * from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States."

SECTION 1(3)(a) (TITLE 49, U. S. C., SEC. 1(3)(a)):

"(3) (a) The term 'common carrier' as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word 'carrier' is used in this chapter it shall be held to mean 'common carrier.' The term 'railroad' as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal

facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this chapter includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof."

SECTION 1 (5)(a) (TITLE 49, U.S.C., SEC. 1(5)(a)).

"(5)(a) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

SEC. 2 (TITLE 49 U.S.C., SEC. 2).

"If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

SECTION 3(1) (TITLE 49, U.S.C., SEC. 3(1)).

"(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

SECTION 6(1) (TITLE 49, U.S.C., SEC. 6(1)).

"(1) Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such

schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter."

SECTION 15(1) (TITLE 49, U.S.C., SEC. 15(1)).

"(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare,

or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

SECTION 15(7) (49 U.S.C., SECTION 15(7)).

"(7) Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affecting thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing

and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

THE "EQUALITY CLAUSE" IN THE ENGLISH STATUTE.

Section 90 of the Railway Clauses Consolidation Act of 1845, 8 & 9, Vict., ch. 20:

"XC. 'And whereas it is expedient that the Company should be enabled to vary the Tolls upon the Railway so as to accommodate them to the Circumstances of the Traffic, but that such Power of varying should not be used for the Purpose of prejudicing or favouring particular Parties, or for the Purpose of collusively and unfairly creating a Monopoly, either in the Hands of the Company or of particular Parties;' it shall be lawful, therefore, for the Company, subject to the Provisions and Limitations herein and in the special Act contained, from Time to Time to alter or vary the Tolls by the special Act authorized to be taken, either upon the whole or upon any particular Portions of the Railway, as they shall think fit; provided that all such Tolls be at all Times charged equally to all Persons, and after the same Rate, whether *per* Ton

per Mile or otherwise, in respect of all Passengers, and of all Goods or Carriages of the same Description, and conveyed or propelled by a like Carriage or Engine, passing only over the same Portion of the Line of Railway under the same Circumstances; and no Reduction or Advance in any such Tolls shall be made either directly or indirectly in favour of or against any particular Company or Person travelling upon or using the Railway."

APPENDIX "B"

Immediately after this page appears a planographic reproduction of Exhibit 38 in the proceedings before the Commission (introduced at R. 273).

Exhibit No. 38
Page No. N
Witness Neale

Comparative Statement of Distances, Rates and Earnings to Houston and Representative Destinations in Southern Territory From The Following Oklahoma Origins Representative of Origin Group No. 6660, as Published in Southwestern Lines' Tariff No. 208-G, I.C.C. No. 3370:

Anadarko
Chickasha
Clinton
Elk City
Hobart
Oklahoma City
Pauls Valley
Waurika

I&S Docket No. 4981

Exhibit No. _____
Page No. 2

From Oklahoma Origins Shown on Page No. 1.

To		(2) Average Shortline Distance (Miles)	Rates				Average Earnings MTH				Average Earnings CCH			
			Col. 1	Col. 2	Col. 3	Col. 4	Col. 1	Col. 2	Col. 3	Col. 4	Col. 1	Col. 2	Col. 3	Col. 4
Houston,	Tex.	(1)453	(1)54		(1)46	(1)40	23.8		20.3	17.7	29.8		50.8	57.4
Birmingham, Columbus, Jackson,	Ala. Miss. Miss.	703	70	61	55		19.9	17.4	15.6		24.9	30.4	39.1	
Montgomery, Talladega,	Ala. Ala.	882	71	62	56		16.1	14.1	12.7		20.1	24.6	31.7	
Gadsden, Huntsville,	Ala. Ala.	798	72	63	57		18.0	15.8	14.3		22.6	27.6	35.7	
Mobile,	Ala.	790	72	63	57		18.2	15.9	14.4		22.8	27.9	36.1	
Opelika, Rome,	Ala. Ga.	900	73	64	58		16.2	14.2	12.9		20.3	24.9	32.2	
Chattanooga, Stevenson,	Tenn. Ala.	841	74	65	59		17.6	15.5	14.0		22.0	27.1	35.1	
Americus, Atlanta, Jackson, Knoxville, Nashville, Ozark,	Ga. Ga. Tenn. Tenn. Tenn. Ala.	875	75	66	60		17.1	15.1	13.7		21.4	26.4	34.3	

To	(2) Average Shortline Distance (Miles)	Rates				Average Earnings							
						ITTI				CCI			
		Col. 1	Col. 2	Col. 3	Col. 4	Col. 1	Col. 2	Col. 3	Col. 4	Col. 1	Col. 2	Col. 3	Col. 4
Athens, Ga. Macon, Ga. Moultrie, Ga.	1030	76	67	61		14.8	13.0	11.8		18.4	22.8	29.6	
Dublin, Ga. Lilberton, Ga.	1068	78	69	63		14.6	12.9	11.8		18.3	22.6	29.5	
Kingsport, Tenn. Morristown, Tenn.	1058	78	69	63		14.7	13.0	11.9		18.4	22.8	29.8	
Augusta, Ga.	1131	80	71	65		14.1	12.6	11.5		17.7	22.0	28.7	
Brunswick, Ga.	1157	84	75	69		14.5	13.0	11.9		18.2	22.7	29.8	
Columbia, S.C. Charlotte, N.C. Darlington, S.C. Greenville, S.C.	1193	82	73	67		13.7	12.2	11.2		17.2	21.4	29.1	
Greensboro, N.C. Greenville, N.C. Roanoke, Va. Suffolk, Va.	1366	87	78	72		12.7	11.4	10.5		15.9	20.0	26.4	
Wilmington, N.C.	1374	89	80	74		13.0	11.6	10.8		16.2	20.4	26.9	

Comparative Statement of Distances, Rates and Earnings to Houston and Representative Destinations in Southern Territory From The Following Oklahoma Origins Representative of Origin Group No. 7660, as Published in Southwestern Lines' Tariff No. 208-G, I.C.C. No. 3370:

Altus

Frederick

Mangum

I&S Docket No. 4981

Exhibit No. _____
Page No. 5

To		(2) Average Shortline Distance (Miles)	Rates Col. 1	Rates Col. 2	Rates Col. 3	Rates Col. 4	Average Earnings MTM Col. 1	MTM Col. 2	MTM Col. 3	MTM Col. 4	CCM Col. 1	CCM Col. 2	CCM Col. 3	CCM Col. 4
Houston,	Tex.	(1)449	(1)54		(1)46	(1)40	24.1		20.5	17.8	30.1		51.2	57.9
Birmingham, Columbus, Jackson,	Ala. Miss. Miss.	754	70	61	55		18.6	16.2	14.6		23.2	28.3	36.5	
Montgomery, Talladega,	Ala. Ala.	900	71	62	56		15.6	13.8	12.4		19.7	24.1	31.1	
Gadsden, Huntsville,	Ala. Ala.	872	72	63	57		16.5	14.4	13.1		20.6	25.3	32.7	
Mobile,	Ala.	808	72	63	57		17.8	15.6	14.1		22.3	27.3	35.3	
Opelika, Rome,	Ala. Ga.	951	73	64	58		15.4	13.5	12.2		19.2	23.6	30.5	
Chattanooga, Stevenson,	Tenn. Ala.	915	74	65	59		16.2	14.2	12.9		20.2	24.9	32.2	
Americus, Atlanta, Jackson, Knoxville, Nashville, Ozark,	Ga. Ga. Tenn. Tenn. Tenn. Ala.	899	75	66	60		16.7	14.7	13.3		20.9	25.7	33.4	
Athens, Macon, Moultrie,	Ga. Ga. Ga.	1072	76	67	61		14.2	12.5	11.4		17.7	21.9	28.5	

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Exhibit No. _____
Page No. 6

To	(2) Average Shortline Distance (Miles)	Rates				Average Earnings							
						MTC				CCC			
		Col. 1	Col. 2	Col. 3	Col. 4	Col. 1	Col. 2	Col. 3	Col. 4	Col. 1	Col. 2	Col. 3	Col. 4
Dublin, Ga.) Elberton, Ga.)	1122	78	69	63		13.9	12.3	11.2		17.4	21.5	28.1	
Kingsport, Tenn.) Morristown, Tenn.)	1131	78	69	63		13.8	12.2	11.1		17.2	21.4	27.9	
Augusta, Ga.	1188	80	71	65		13.5	12.0	10.9		16.8	20.9	27.4	
Brunswick, Ga.	1190	84	75	69		14.1	12.6	11.6		17.6	22.1	29.0	
Columbia, S.C.) Charlotte, N.C.) Darlington, S.C.) Greenville, S.C.)	1265	82	73	67		13.0	11.5	10.6		16.2	20.2	26.5	
Greensboro, N.C.) Greenville, N.C.)	1449	87	78	72		12.0	10.8	10.0		15.0	18.8	24.8	
Roanoke, Va.) Suffolk, Va.)	1435	90	81	75		12.5	11.3	10.5		15.7	19.8	26.1	
Wilmington, N.C.	1447	89	80	74		12.3	11.1	10.2		15.4	19.4	25.6	

EXPLANATION

Col. 1 - Minimum weight 25,000 pounds
Col. 2 - " " 35,000 "
Col. 3 - " " 50,000 "
Col. 4 - " " 65,000 "

MTM - Mills ton mile

CCM - Cents car mile

Authority for rates - Southwestern Lines' Tariff No. 208-G, I.C.C. No. 3370.

(1) Average distance and average rates taken from Exhibit No. 33.

(2) Except as explained in (1) average distances compiled from distances shown in Exhibit No. 34.

APPENDIX "C"

Reproduction of Exhibit 27 in the Commission's proceedings (introduced at R. 253)

(The first two blocks show the present and the proposed rule in the transit tariff; the last two blocks show the present and the proposed rule in the carload rate tariff.)

"Loading Rules on Cotton at Oklahoma Points

"Present and Proposed Reading of Suspended Items Agent J. R. Peel's I. C. C. Nos. 3307 and 3370

(Proposed changes are in italics)

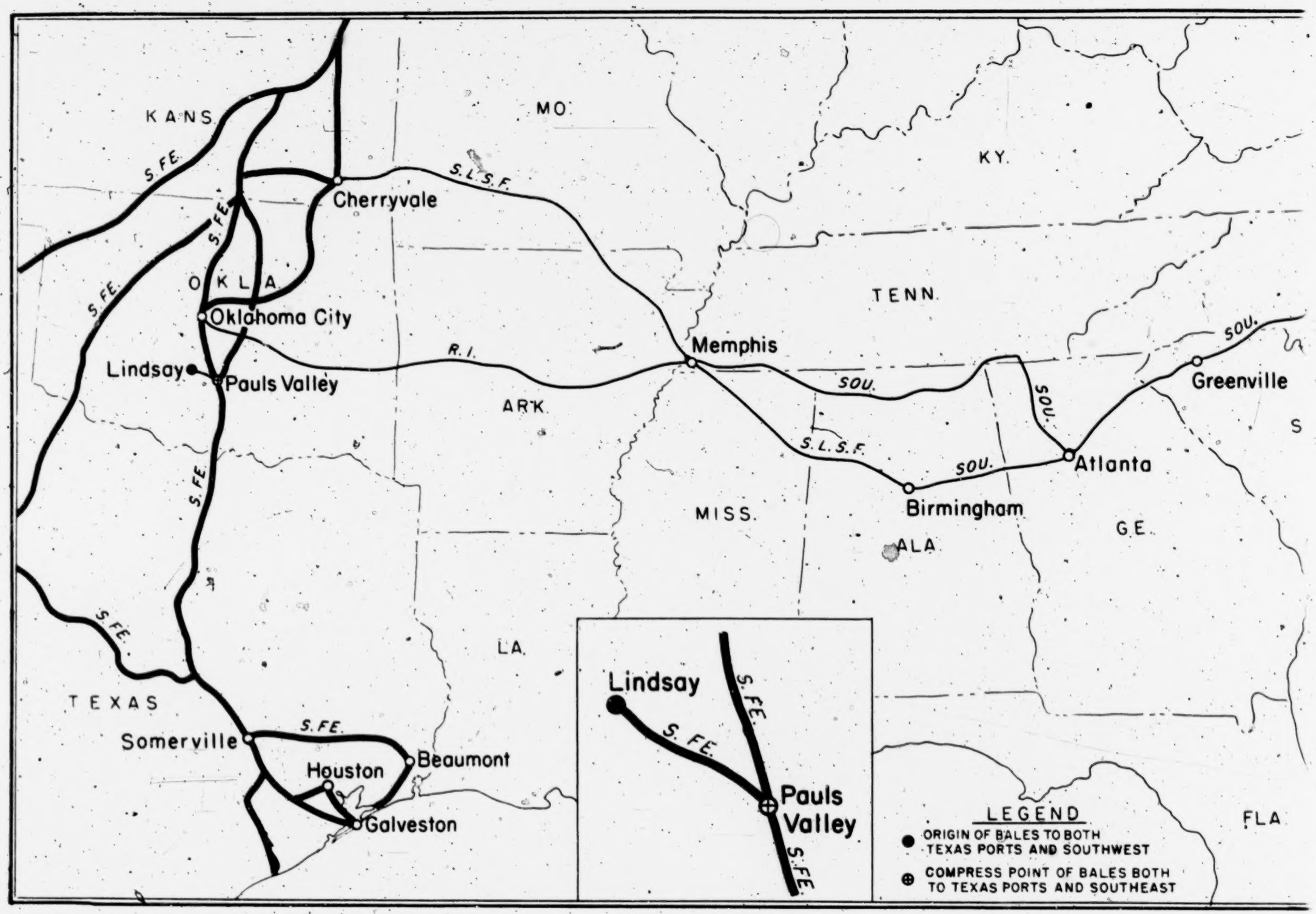
"Item No.	Present Reading
325 Peel's ICC 3307	Charges for Shipments Loaded by Carriers On cotton reshipped from concentration points under carload rates, a loading charge of 5½ cents per square bale and 2¾ cents per round bale will be assessed on shipments of cotton moving into concentration points on basis of inbound rates published in Item 390,[24] if the cotton was loaded at points of origin by the carrier after tender at its depot or cotton platform. The loading charge will be in addition to the through rate and will be collected when charges are readjusted under the provisions of Item 220 herein, unless the charge is paid at point of origin. (Non-pertinent note omitted)

[24] Brief writer's note: These are the "float-in" rates which apply on the move from the original shipping point to the transit point.

Item No.	Proposed Reading
325-B Supplement No. 18 to Peel's ICC 3307	CHARGES FOR SHIPMENTS LOADED BY CARRIERS On cotton reshipped from concentration point under carload rates, a loading charge of 5½ cents per square bale and 2¾ cents per round bale will be assessed on shipments of cotton moving into concentration points on basis of inbound rates published in Item 390, if the cotton was loaded at points of origin by the carrier after tender at its depot or cotton platform (*See Exception*). The loading charge will be in addition to the through rate and will be collected when charges are readjusted under the provisions of Item 220 herein, unless the charge is paid at point of origin. (Non-pertinent note omitted) EXCEPTION—*Applicable only at points in Oklahoma on the ATcSF, GCcSF, PcSF, or M-K-T or KCS or Okla Ry and only on shipments to Beaumont, Corpus Christi, Galveston, Houston, Orange, Port Arthur or Texas City, Texas or Lake Charles, La. When cotton is tendered to carrier at origin on its depot or cotton platform, such shipment will be loaded by or at the expense of the carrier.*

"Item No.	Present Reading
120 Peel's I.C.C. 3370	CHARGES FOR SHIPMENTS LOADED BY CARRIERS Shipments moving for compression and (or) consolidation in transit under the provisions of Item 200 will be loaded at point of origin by the carrier, when tender is made at carrier's depot or cotton platform, at a charge of 5½ cents per square bale and 2¾ cents per round bale. This loading charge will be in addition to the through rate and, upon request of shipper, may follow shipment as an advance charge, such advance charge to be inserted in the original bill of lading.

"Item No.	Proposed Reading
120-A Supplement No. 12 to Peel's I.C.C. 3370	CHARGES FOR SHIPMENTS LOADED BY CARRIERS *Except as provided in Item 121.* Shipments moving for compression and (or) consolidation in transit under the provisions of Item 200 will be loaded at point of origin by the carrier, when tender is made at carrier's depot or cotton platform, at a charge of 5½ cents per square bale and 2¾ cents per round bale. This loading charge will be in addition to the through rate and, upon request of shipper, may follow shipment as an advance charge, such advance charge to be inserted in the original bill of lading.
121-A Supplement No. 12 to Peel's I.C.C. 3370	*Loading of cotton at stations in Oklahoma* *Applicable only at points in Oklahoma on the AT&SF, GC&SF, P&SF, M-K-T or KCS or Okla Ry and only on shipments to Beaumont, Corpus Christi, Galveston, Houston, Orange, Port Arthur, or Texas City, Texas, or Lake Charles, La. When cotton is tendered to carrier at origin on its depot or cotton platform; such shipment will be loaded by or at the expense of the carrier."*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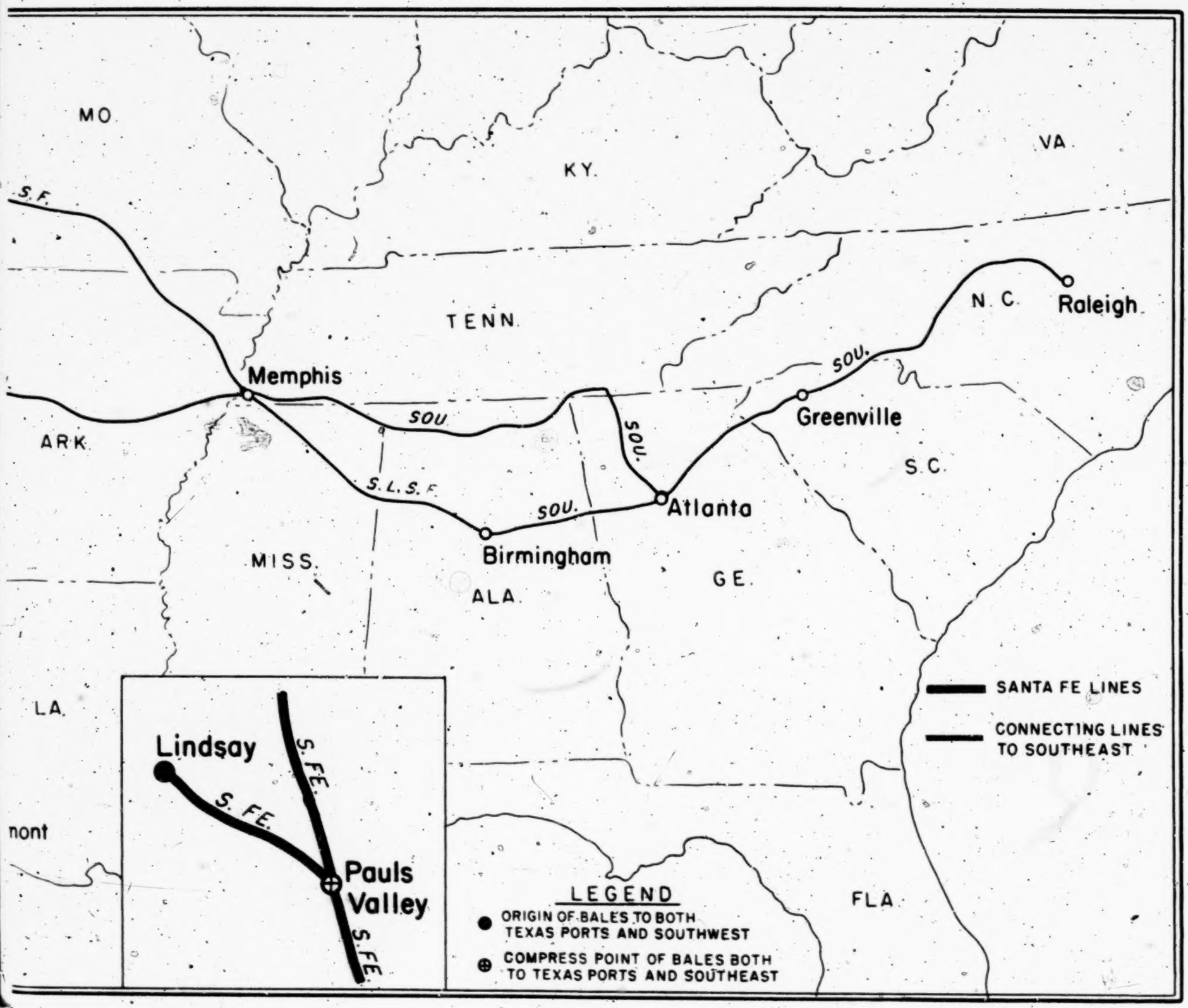
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LEGEND
ORIGIN OF BALES TO BOTH TEXAS PORTS AND SOUTHWEST
COMPRESS POINT OF BALES BOTH TO TEXAS PORTS AND SOUTHEAST

REPLY BRIEF FOR THE APPELLANT

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 520

L. T. BARRINGER AND COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

REPLY BRIEF ON BEHALF OF APPELLANT.

LUTHER M. WALTER,
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Counsel for Appellant.

BARNARD & MILLER, 33 S. Market St., Chicago. FRAnklin 0562

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CASES CITED.

STATUTES.

IN THE

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Appellant,

vs.

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Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

REPLY BRIEF ON BEHALF OF APPELLANT.

Appellant's principal brief is believed to be sufficient to show the error in most of the contra arguments advanced by appellees. Consequently, this reply brief is limited to a clarification of the questions in dispute and to answering such contentions of appellees as were not anticipated in the principal brief and which appear to require answer.

THE OPPOSING CONTENTIONS.

As to Section 2. The Government and the Commission concede that "if the Commission based its conclusion under Section 2 on the fact that there was a difference in motor-truck competition and in the levels of rates on the respective line-hauls, it was considering factors which it was not legally entitled to consider." (Br. 12, 28) Appellees support the order on the theory that Section 2 has no application, as a matter of law, to a difference in separately stated loading charges for identical loading services, *unless* the line-haul services rendered on the cotton after loading are also identical as to final destinations and routes. (Gov. Br. 28 *et seq.*; R. R. Br. 12, *et seq.*) While there is no finding in the report to show that the Commission pitched its order on the ground just stated, appellant agrees with appellees (Gov. Br. 25-26; R. R. Br. 35-36) that such an omission is immaterial if appellees are correct in their construction of the statute.

These concessions narrow the disputed question under Section 2 to whether the difference in destinations to which the cotton is reshipped under transit makes the section wholly inapplicable to the case.

If the question of statutory construction is so limited, it would then appear that all questions as to the adequacy of the findings or of the evidence to support the ultimate conclusion and order of the Commission under Section 2 are eliminated from the case. That is to say, if the Commission had no right to consider either the alleged difference in truck competition or the alleged difference in the relative levels of the respective line-haul rates in passing upon the Section 2 issue, its order is not aided by any findings or evidence as to those matters, but must stand or fall on the single question of statutory construction above stated.

As to Section 3. The parties agree that the Commission in reaching its conclusion under Section 3(1) was entitled to consider differences in the matter of truck competition, although they differ as to whether the order is supported by an adequate and relevant finding in regard thereto. Appellant urges that the particular difference in truck competition mentioned in the report (from the compress to final destination and not from the gin origin, where the loading occurs, to any destination other than the compress) has no relevancy to, or connection with, the service of loading at the gin origin, although appellant concedes that the evidence supports the irrelevant statements as to this matter found in the report.

As to the alleged difference in the relative levels of the respective line-haul rates as a legitimate consideration under Section 3(1), the contentions of the appellant, all of which are opposed by the appellees, are: (1) the recital of the Commission is not a finding and, if considered a finding, is without either significance or meaning; (2) the evidence does not support the recital; and (3) the Commission was not legally entitled to consider a more favorable adjustment of line-haul rates to the Southeast than to the Texas ports as offsetting the difference in separately established loading charges of which appellant complains, so as to excuse the undue prejudice and preference occasioned thereby.

THE APPLICATION AND CONSTRUCTION OF THE STATUTE.

SECTION 2 PROHIBITS A DIFFERENCE IN CHARGES FOR IDENTICAL LOADING SERVICES DESPITE A DIFFERENCE IN ULTIMATE DESTINATIONS.

Appellees contend, as a matter of law, that Section 2 does not apply to a difference in separately stated loading charges *unless* the traffics subject to the different

charges are transported in line-haul service from the same origin, to the same destination, over the same line. In support they cite *Wight* v. *United States*, 167 U. S. 512, as holding that Section 2 applies to a difference in charges for identical terminal services "*only*" when the line-haul services are likewise identical. (Gov. Br. 24; R. R. Br. 12) However, there is nothing in the opinion of this Court in the *Wight* case to justify the use of the word "only". The line-haul services were identical in that case and a Section 2 violation was found. That case did not involve the question as to how Section 2 should be applied if the line-haul services had been different, and this Court did not go beyond the issues of the case.

Furthermore, the *Wight* case bears no analogy to the instant case as to the point under discussion. In that case no tariff provided for a drayage service or allowance to any shipper; the tariff before this Court did provide the line-haul rates. In the case of the favored shipper, the line-haul rate was reduced, without tariff authority, by 3½ cents per 100 pounds through the device of a cartage allowance. No similar departure from the tariff was made for the competing shipper. Consequently, those shippers paid different charges for line-haul services and in such a case it was appropriate for this Court to emphasize the fact that the line-haul services were identical. The heart of that case was in the fact that there was an unauthorized reduction, definite and measureable, in the published line-haul rate for the favored shipper and no corresponding reduction in the line-haul rate paid by a competitor for an identical line-haul service. As is correctly said in the brief of the railroad appellees (Br. 13): "The conviction was sustained by this Court because the Baltimore & Ohio, in effect, charged Bruening only 11½ cents for the same line-haul transportation for which it charged

Wolf the full 15 cents." The Government is in error in saying (Br. 29): "That was not a case where the service involved was actual carriage over the railroad * * *."

In the instant case, however, the charges and services involved are separate in fact, and by tariff, from the line-haul rates and services. The amended tariff made no change in the line-haul rates either to the Southeast or to the Texas ports. Shippers continue to pay the same line-haul rates in their entirety as were in effect before the tariff was amended. However, under the amended tariff, the loading service on cotton when ultimately reshipped to the Texas ports becomes free,[1] although the separate tariff charge is continued on the traffic of appellants receiving an identical service. These facts bring into play the Section 2 prohibition against a difference in charges "for any service" regardless of the difference in ultimate destinations.

Appellees also cite a number of cases in which the Commission has said in substance that Section 2 applies only when identical line-haul services are involved. The majority number of such cases, noted in the margin,[2] involved only charges for line-haul services; and the holding of the Commission in those cases is obviously without pertinency to the different question involved in the instant case.

In another group of cases cited by appellees (*Richmond*

[1] The Government and the Commission characterize the service as "free" on pages 20 and 21 of brief.

[2] The cases cited as to line-haul rates include: *Bunker Hill Co.* v. *N. P. Ry. Co.*, 129 I. C. C. 242; *Cane Sugar from Wisconsin to Minnesota*, 203 I. C. C. 373; *Capital City Gas Co.* v. *Central & Rutland Co.*, 11 I. C. C. 104; *Fort Smith Traffic Bureau* v. *St. L. S. F. R. R. Co.*, 13 I. C. C. 651; *Laurenceville Cooperage Co.* v. *A. C. Ry. Co.*, 226 I. C. C. 773; *Miller Waste Mills* v. *C. M. St. P. & P. R. Co.*, 226 I. C. C. 451; *Pacific Lbr. Co.* v. *N. W. P. R. R. Co.*, 51 I. C. C. 738; *Standard Oil Co.* v. *Director General*, 87 I. C. C. 214.

Chamber of Commerce v. *S. A. L. Ry.* (1917), 44 I. C. C. 455, 466, and *Tide Water Oil Co* v. *Director General* (1921), 62 I. C. C. 226, 227), the Commission found Section 2 inapplicable to the failure of a line-haul carrier to absorb the switching charge of a terminal line on traffic from one origin while contemporaneously absorbing the same switching charge on traffic from another origin, it being held that the difference in origins was sufficient to take such a case entirely out of Section 2. Appellees argue that the difference in the loading charges complained of by appellant is analogous to the difference in absorption practices involved in the cases cited.

No court case is cited on the point,[3] and there is no issue in this case which requires the Court to decide what the rule ought to be in the case of switching absorptions.

[3] In *Seaboard Air Line Railway Co.* v. *United States*, 254 U. S. 57, this Court sustained a Section 2 order of the Commission which related to differences in switching absorptions as to traffic *from a common origin and over the same line*. That case did not involve the question of how the statute should be applied to a difference in absorptions as to traffics from different origins. In *Manufacturers R. Co.* v. *United States*, 246 U. S. 457, cited by the Government on the question of findings (Br. 18), this Court sustained an order of the Commission which declined to find that Section 2 was violated by a difference in absorption practices, although neither the Commission nor this Court rested the decision in that case on any difference in line-haul services. In that case, a terminal switching line at St. Louis, Mo., referred to as the Railway, and various shippers served by it, complained under Section 2 because its charges were not absorbed, although contemporaneously the same line-haul carriers absorbed the charges of the Terminal Railroad Association in the same area. The Commission found that such a difference in absorption practices was not in violation of Section 2. In sustaining the order, this Court pointed to the fact (p. 482) that the reports of the Commission disclosed a difference in the matter of the physical services for which the respective switching charges were assessed, making specific mention "of the different conditions of location, ownership, and operation as between the Railway and the Terminal." However, the inapplicability of Section 2 was not predicated on a difference between the line-haul services received by the traffic on which the switching charges were absorbed and the line-haul services received by the traffic on which the switching charges were not absorbed.

However, conceding, *arguendo*, that the Commission correctly construed Section 2 as prohibiting differences in switching absorptions *only* where the traffics receive the same line-haul services, it does not, perforce, follow that Section 2 is inapplicable to this case. See *Birkett Mills v. D. L. & W. R. R. Co.* (1927), 123 I. C. C. 63, 65, decided long after the Commission cases relied upon by the appellees. The Government suggests, without referring to it by name, that the *Birkett* case was disposed of as a factual case in which the Commission exercised its administrative discretion to exclude from consideration the differences in line-haul services instead of holding that such differences must be excluded as a matter of law. (Br. 29-30) The excerpt from the decision quoted in the margin shows the Government to be in error.[4]

A difference in the absorptions which one carrier makes of the switching charge of another carrier has no similarity, insofar as the application of Section 2 is concerned, to a difference in the charges which a carrier assesses for identical loading services performed by it.

In the first place, when a carrier declines to absorb the switching charges of another carrier, it does not thereby collect more from the shipper than it would collect if the switching charge were absorbed. While the shipper pays more, his additional payment is to the switching carrier. Consequently, whether a carrier absorbs or does not absorb a switching charge, the amount which *that* carrier collects from the shipper remains constant, and the difference is

[4] In that case the Commission said: "With respect to unjust discrimination, complainants also rely on the differing transit charges on ex-lake and all-rail traffic. They contend that, as the transit charges are separately established charges for distinct services, they must stand or fall as such. They refer to *Central R. R. Co. v. United States*, 257 U. S. 247, in which it was held that a transit charge is a local charge for which the carrier establishing it is alone responsible. We believe that complainants' position is sound and that, as the differing transit charges are for the same transit services at the same points by the same carriers, unjust discrimination under section 2 of the act exists."

entirely in the aggregate service covered by the amount (line-haul rate) so collected. However, in this case, the amounts collected from the shipper by the Santa Fe Railroad differ depending directly upon whether the loading service is performed free or whether the loading service is performed for a separately stated charge, and the service rendered by the Santa Fe is constant, in its parts and in the aggregate, in both cases. It is that difference in the amounts collected by the Santa Fe Railroad for identical loading services performed by it which is prohibited by Section 2.

In addition, a difference in line-haul services in a case involving a difference in absorption practices has a significance and effect which has no similarity to a difference in line-haul services in a loading charge case. To develop that distinction requires an analysis of the character and effect of a switching absorption.

The services rendered in a switching absorption case always involve two distinct services rendered by two distinct carriers; one, the line-haul service rendered by the line-haul carrier, and the other, the switching service rendered by the switching carrier. Invariably, two separate charges by two separate carriers are published for these two separate services. When the switching charge is absorbed, the line-haul carrier places in its own tariff a provision that the rate published by it to a particular destination will cover not only deliveries reached by its own lines, but also deliveries reached by the rails of the switching lines at the point. The tariff of the line-haul carrier further provides that the charges assessed by such switching lines for the switching services which they perform in reaching such latter deliveries will be paid for by the line-haul carrier out of its published line-haul rate. When a line-haul carrier so pays out of its rate the switching charge of another carrier, it is referred to as an **"absorption".**

In *National Dock & Storage Warehouse Co.* v. *B. & M. R. R.* (1916), 38 I. C. C. 643, 650, the Commission said:

> "* * * So far as the shipping public is concerned the effect of a switching absorption is to establish a joint rate; the cancellation of an absorption is the withdrawal of a joint rate, leaving effective the higher aggregate of intermediate rates."[5]

The act of providing the equivalent of a joint rate is the act of the line-haul carrier. The switching line is not a party to the arrangement between the line-haul carrier and the shipper from whom the latter collect its tariff charges (the line-haul rate), although the switching line does act as the agent of the line-haul carrier in transporting the traffic from point of interchange to point of delivery. The legal effect of a switching absorption, as stated by this Court in *Missouri Pacific R. R. Co.* v. *Reynolds-Davis Grocery Co.*, 268 U. S. 366, is to extend the through line-haul rate to a delivery on the rails of the switching line and to make the switching line the agent of the line-haul carrier.[6]

[5] To the same effect are *Switching Absorptions* (1917), 47 I. C. C. 583, 586; *Butterfield Co.* v. *N. O. & N. E. R. R. Co.* (1919), 55 I. C. C. 741, 743; *Southern Roads Co.* v. *G., H. & S. A. Ry. Co.* (1928), 140 I. C. C. 413, 414; *Absorption of Switching Charges* (1929), 153 I. C. C. 595, 597; *Absorption of Switching Charges* (1929), 157 I. C. C. 129, 132; *Fitchburg Gas & Electric Co.* v. *Boston & M. R.* (1930), 164 I. C. C. 487, 493.

[6] In that case this Court said (Italics ours): "*The joint through rate covered delivery at the warehouse of the consignee.* The bill of lading named Morgan's Louisiana & Texas Railroad & Steamship Company as the initial carrier, and the route designated therein named the Missouri Pacific as the last of the connecting carriers. Its lines enter Fort Smith, but do not extend to the consignee's warehouse. It employed the St. Louis-San Francisco to perform the necessary switching service. And it paid therefor $6.30, the charge fixed by the tariff on file with the Interstate Commerce Commission. The switching carrier was not named in the bill of lading, and did not receive any part of the joint through rate. *It was simply the agent of the Missouri Pacific for the purpose of delivery.* The Missouri Pacific was the delivering carrier, and is liable as such."

With the foregoing considerations in mind, it is plain that when a shipper complains of a difference in absorption practices, his complaint is directed to the amount of the service covered by the line-haul rate and not to the amount of the charge for the switching service as such. Consequently, if a switching charge is absorbed on traffic from one origin but not from another, a complaining shipper cannot rely on Section 2 because the difference in origins results in a dissimilarity in the physical services covered by the rates against which the complaint is brought. However, in this case, the complaint is directed to the difference in the charges assessed by one carrier for identical loading services, and there is no complaint as to the line-haul rates, the latter not even being in issue.

In a case of a difference in switching charges collected, as such, by the same carrier for identical switching services, there is no authority which suggests that the traffic must be handled in identical line-haul services before that carrier can be found guilty of violating Section 2. We are unable to cite a case in which such a Section 2 violation has been found, simply because no case can be located in which a particular carrier maintained a difference between the switching charge assessed on traffic from one origin and the switching charge assessed on traffic from another origin, the switching services being identical in the two cases. However, we may cite by analogy *Buffalo, Rochester & Pittsburgh Ry.* v. *Pennsylvania Co.* (1913), 29 I. C. C. 114, in which an order of the Commission involving discrimination between connecting carriers was sustained in *Pennsylvania Co.* v. *United States*, 236 U. S. 351. In that case the Pennsylvania Railroad performed switching services at New Castle, Pa., for the Pittsburgh and Erie Railroad, the Erie Railroad, and the Baltimore &

Ohio Railroad for a uniform charge of $2 per car. It declined to perform similar switching services for the complainant with whom it likewise had a connection at New Castle. That difference in treatment was held by the Commission to be discriminatory in violation of the provisions of Section 3 which prohibit discrimination as between connecting carriers. The order of the Commission was not restricted to the discrimination practiced in respect to traffic transported by the complainant between New Castle, on the one hand, and points served by the complainant in common with the favored railroads, on the other. Consequently, the order reached traffic as to which the distant origins and destinations were dissimilar. In sustaining that order, this Court declined to treat differences in circumstances and conditions unrelated to the physical switching services rendered as excusing the discrimination complained of.

The railroad appellees cite *Cattle Raisers' Assn.* v. *Fort Worth & D. C. Ry. Co.* (1898), 7 I. C. C. 513, 539, as holding that a difference in terminal charges does not constitute unjust discrimination under Section 2 unless the line-haul transportation is between the same points, over the same railroad, and in the same direction in both instances. (Br. 15, 24) However, in that case, the complaint was not directed to difference in terminal charges for identical services rendered at the same point; rather the complaint was addressed to the fact that a terminal charge was assessed at Chicago while a similar terminal charge was not assessed at other livestock markets (p. 539). Obviously, such a case has no similarity to the instant case.

As stated, the Government and the Commission concede that if the Commission based its decision under Section 2 on the fact that there was a difference in the relative levels of the line-haul rates, it considered a factor which

it was not legally entitled to consider. (Br. 12, 26). Presumably, that concession is induced because this Court holds that differences in circumstances legally entitled to consideration under Section 2 do not include those which arise either before the service of the carrier begins or after it is terminated. Differences in the respective line-haul rates come within such excluded differences, since the only service of the carrier under consideration in this case is the service of loading. By analogy, if differences in line-haul rates are not entitled to consideration, a difference in the destinations to which those rates apply should be likewise excluded therefrom.

In our principal brief, we pointed out that this Court sustained a Section 2 order of the Commission relating to loading services in *Merchants Warehouse Co. v. United States*, 283 U. S. 501, 512, without considering whether the line-haul services were the same or different. The Government and the Commission seek to distinguish that case on the ground that "the complainants there were warehousemen rather than shippers." (Br. 30). Appellees overlook the finding of this Court that the complaining warehouse companies were persons within the meaning of that word as used in Section 2 (p. 512) and that such warehousemen were also consignors and consignees of the merchandise. The appellant here has a similar status.

THE COMMISSION WAS NOT ENTITLED UNDER SECTION 3(1) TO CONSIDER THE ALLEGED DIFFERENCES IN THE RELATIVE LEVELS OF THE RESPECTIVE LINE HAUL RATES AS A CIRCUMSTANCE WHICH JUSTIFIED OR EXCUSED THE UNDUE PREFERENCE AND PREJUDICE OCCASIONED BY THE DIFFERENCE IN LOADING CHARGES.

The railroad appellees urge that the Commission had a right to consider the relative levels of the line-haul rates on the ground that "relative profit to the carrier" from

such *line-haul* rates is a circumstance which warrants a difference in the local *charges for loading*, it being also stated that "relative costs of service and profit to the company were factors which might properly be considered." (Br. 29) However, the contention that large profits from one charge may be offset by slight profits from another charge is in the face of the principle enunciated in *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, which the railroad appellees do not attempt to distinguish insofar as the application of the rule thereof to a Section 3(1) case is concerned. (Br. 23-4)

Furthermore, the Government and the Commission admit that the consideration of the relative rate levels by the Commission was not predicated on any finding that "the Southeastern rates were necessarily relatively lower, so far as the net return which they brought to the carrier was concerned." (Br. 21) That admission could not be avoided since the record contains no evidence as to costs or profits, relative or otherwise, as to the line-haul rates and service.

The Government and the Commission seek to distinguish the *Stickney* case (Br. 30-1) on the ground that the principle thereof does not apply "where the same carrier, as here, assesses the terminal charge and the line-haul charge." However, the distinguishing circumstance, even if otherwise valid, is not in fact present in this case. The terminal (loading) charge is assessed and controlled by the railroad appellees for services performed by them for which no other carrier has any responsibility. While these same carriers participate in the line-haul rates to the Southeast, they do so in a very limited way. On page 9 of brief, the Government and the Commission say:

> "* * * It is to be noted that none of these carriers serves the Southeast and that they do not have any

but a very short part of the line-haul on cotton from Oklahoma to the Southeast, as is shown by the map appended at the end of appellant's brief."

Furthermore, even if all of the line-haul rates applied entirely over the Santa Fe, that carrier must bring each individual charge in conformity with Section 3(1). The Act does not authorize a carrier to offset an unduly prejudicial charge for one service against an unduly preferential charge for some other service. Rather, it prohibits each individual undue prejudice and preference.

Additionally, it is not true that the terminal charge in the *Stickney* case was published and collected by a carrier different from the delivering line-haul carrier. The opinion of this Court is quite clear on that point.

Consequently, if the decision of the Commission under Section 3(1) is predicated on the proposition that the disparity in loading charges assessed by the Santa Fe is offset or justified by the fact that the Santa Fe and its connections to the Southeast publish line-haul rates which are lower than they should be as compared with the rates to the Texas ports, the rule of the *Stickney* case is plainly applicable as invalidating such action.

The applicability of that rule is emphasized by *Central Railroad Co. of New Jersey* v. *United States*, 257 U. S. 247. There this Court held that an accessorial service was local to the carrier which provided it and could not be considered as an integral part of the line-haul rate structure so as to make other carriers participating therein responsible, within the meaning of Section 3(1), for a difference in accessorial services and charges not maintained by them. The Government and the Commission seek to distinguish that case on the ground (Br. 33) that in the instant case (italics ours):

> * * * The Commission did not purport to pass upon the validity of line-haul rates of connecting carriers not before it or to require any action from them with respect to *this local loading charge over which they had no control*. It merely looked to the respective line-haul conditions in determining whether the local loading charge of the carriers before it was discriminatory or prejudicial."

But the "look" which the Commission took was unwarranted unless the lawfulness of a disparity in local charges for loading was a responsibility of the connecting line-haul carriers. That is to say, unless the line-haul carriers to the Southeast can be held jointly responsible with the Santa Fe Railroad for the level and relationship of local charges for loading maintained by the latter, the Commission had no right to treat a more favorable line-haul adjustment on appellant's traffic, even if true, as an offset to an unfavorable adjustment of loading charges. We agree with the Government that "one carrier may not be made to suffer for the shortcomings of another." (Br. 30) Conversely, one carrier may not take an unfair advantage of a shipper in respect to one charge, because other carriers have granted him an unnecessary or unwarranted advantage in respect to some other charge.

The railroad appellees state (Br. 23) that the Southeastern lines "virtually control," *i. e.*, are responsible for these local loading charges, on the ground that if the Southeastern lines were not satisfied with the manner in which the Santa Fe Railroad adjusted its loading charges, such Southeastern lines could withdraw from the joint rate structure. This Court has held very specifically that the right of connecting carriers to withdraw from a joint-rate structure does not constitute control, virtual or otherwise, over an accessorial service and charge maintained by another line with which they maintain joint rates.

Central Railroad Co. of New Jersey v. *United States*, 257 U. S. 247, 256, 258-9.

The railroad appellees argue that the prohibitions in the Act apply only to the aggregate charges collected from a shipper and do not apply independently to separately stated charges. *United States* v. *Chicago & Alton Ry. Co.*, 148 Fed. 646, is cited as holding "that the word 'rate' as used in the Interstate Commerce Act means the net costs to the shipper of the transportation of his property" and that such net costs cannot be determined without considering "all money transactions of every kind or character" between the carrier and the shipper. (Br. 19) Appellees overlook the fact that the case cited involved an indictment for rebating under the Elkins' Act (49 U. S. C., Sec. 41), which act uses the word "rate," and did not involve the construction of either Section 2 or Section 3(1) of the Interstate Commerce Act.

The appellees also rely on a number of cases involving refrigeration services and charges noted in the margin[7] (Gov. Br. 31; R. R. Br. 20) in which it has been held that in determining the reasonableness of line-haul rates under Section 1(5)(a), the Commission has authority to fix a line-haul rate in consideration of the accessorial services covered thereby, and also has authority, in its discretion, to fix separately published reasonable charges for such accessorial services. Those cases have no bearing on the point under discussion for two good reasons.

In the first place, the primary issue in those cases was as to the lawfulness of the line-haul rates. No such

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[7] *Atchison, Topeka & Santa Fe Railway Company* v. *United States*, 232 U. S. 199, 219-211; *Alton & S. R. R.* v. *United States*, 49 F. (2d) 414, 417-429 (N. D. Cal. statutory three judge court); *Pacific States Butter Assoc.* v. *Southern Pacific Co.*, 151 I. C. C. 244, 263-264; *Perishable Freight Investigation*, 56 I. C. C. 449, 461-465.

issue is involved in this case; in fact, the line-haul rates were not before the Commission.

In the second place, the amended tariff did not serve to reconstruct the line-haul rate so as to make it cover services not theretofore included thereunder. Rather, the amended tariff simply provided for a free[8] loading service on cotton reshipped to the Texas ports. The prior line-haul rates contained nothing to cover the loading service, the char[illegible] therefor being separately stated. The line-haul rates were not changed when the loading charge was eliminated.

Under such circumstances the instant case is not one which involved the fixing of a reasonable line-haul rate so as to cover the loading service as well. In respect to this matter, the tariff change has a significance which is the converse of the change considered by this Court in *Interstate Commerce Commission* v. *Chicago, B. & Q. R. Co.*, 186 U. S. 320, 336-7. In that case, railroads serving Chicago had for years maintained a line-haul rate which covered not only line-haul services but also the terminal service of placing the loaded cars at the Union Stock Yards. On June 1, 1894, the carriers gave appropriate notice that thereafter the total charge to the shipper would be composed of the existing line-haul rate plus a $2 per car charge for terminal services. This Court, speaking through Mr. Justice White, held the result of that tariff change was not the equivalent of separating the terminal portion out from the line-haul rate so as thereafter to have each service covered by its own separate charge; rather, the original line-haul rate continued to cover the terminal service so that the new terminal charge "was a mere addition to the sum of the terminal charge embraced in

[8] The Government and the Commission characterize the service as "free" on pages 20 and 21 of brief.

the prior through rate." The analogy to the instant case is plain and distinguishes the cases cited in the margin (see footnote 7) relied upon by the appellees.

THE LACK OF ESSENTIAL FINDINGS.

As to the relative levels of the respective line-haul rates. Appellant asserts that the report of the Commission fails to disclose what is meant by the statement that rates to the Southeast are "relatively lower" than to the Texas ports. The Government and the Commission admit that the finding is not to be read as meaning the rates to the Southeast were relatively lower than to the Texas ports "so far as the net return which they brought to the carrier was concerned." (Br. 21) On the same page this is said:

> "* * * Read in its context then, the phrase, 'relatively lower' can be given a clear and pertinent meaning, *viz.*, that the gross rates to the Southeast were relatively lower to the shipper."

A table of rates shown on page 30 of the Government brief, which is taken from Exhibit 38 appended to appellant's brief, shows that the carload rates subject to a 50,000-pound minimum are 46 cents per hundred pounds to Houston, and 67 cents per hundred pounds to Columbia, S. C. The *gross* rate to the Southeast is thus shown to be actually *higher* than to the Texas ports and the disparity is increased when a charge of 5½ cents per bale is added to the Southeastern rates but not to the Texas port rates. Consequently, if the Commission meant what its counsel says it meant, it misstated the fact.

We think that counsel intended to say gross, as distinguished from net, *earnings per mile* rather than gross *rates*. Even if so considered, the finding has no pertinency to any issue in this case. It can hardly be a

sound rule to impose a loading charge on a long-haul shipment, but not on a short-haul shipment, simply because the line-haul rates, when properly constructed, are lower per mile on former than on the latter shipments.

As to truck competition. The briefs of the appellees suggest that they misunderstand our contention as to the failure of the report to support the ultimate conclusion under Section 3(1) by an adequate finding as to a difference in truck competition. To make our position clear, we develop the point again.

The only finding in the report as to a difference in truck competition is directed to trucking from a *compress (transit) point* to ultimate destination. Appellant insists that the difference mentioned has no relation to the amended tariff because, if the purpose of the free loading at the gin origin is to meet truck competition, the competition so to be met is encountered in the haul from the gin origin to the compress point, rather that from the compress point to final destination. Further, free loading at gin origin cannot, as a practical matter, have any influence on whether a truck or a railroad will be used in the subsequent haul from compress point to final destination. This is made plain by the undisputed facts.

When the cotton is loaded at a gin, neither the shipper nor the railroad has any idea as to where it may go after concentration and compression at the compress point. The acute truck competition is encountered in connection with the move from the gin origin to the compress point (R. 117, 126, 128), and that competition is the same, regardless of ultimate destination of the cotton, which is not determined until later. (R. 136) The principal witness for the railroad appellees testified that the main purpose of the free loading was to stop the gin-to-compress trucking. (R. 123-4)

Unless the free loading attracts the cotton to the rails *at the gin origin*, it plainly affords no aid whatsoever in meeting truck competition. Certainly, unless it does attract the cotton to the rails at the gin origin, the free loading cannot influence the means of shipment from the compress. If the cotton moves from the gin to compress by truck, it will be reshipped from the compress point as "local" cotton, that is, not under transit, and the shipper is free to select a railroad or truck for the move to final destination. That selection could not be influenced in the slightest by the amended tariff since it does not apply to the cotton involved in that selection of routes. However if the free loading attracts the cotton to the rails at the gin, and thus takes it away from the trucks on the gin-to-compress move, its entire and only purpose has been attained. This is because any cotton which moves from gin to compress via rail is bound to be reshipped via rail from the compress, since, otherwise, the shipper is not in a position to secure a transit settlement and thereby recover all or a substantial part of the inbound charges paid.

It thus appears that a difference in the trucking competition from the compress point to ultimate destination has no relation to the amended tariff, nor is it a circumstance which affords a rational basis for the difference in loading charges at the gin origin. For that reason, the finding as to truck competition made by the Commission affords no support for the order of which appellant complains.

Incidentally, the railroad appellees mistakenly credit the report with a finding "that cotton is handled by truck from gin origins to compress stations *and interstate destinations.*" (Br. 36) The statements in the report to which reference is made (R. 22-3) constitute no finding as to the handling of cotton from a gin origin to an inter-

state destination insofar as the movement by truck is concerned. The finding as to the cotton handled from gin origin to interstate destination relates only to the movement by railroad.

THE LACK OF EVIDENCE.

Under Section 2. No question of evidence now presents itself under Section 2 since the question for decision is wholly one of statutory construction.

Under Section 3. No question as to evidence in connection with the matter of truck competition is involved since appellant admits that the evidence supports the findings of the Commission although, as just stated, it contends that such findings are insufficient to support the order.

Insofar as the evidence relating to the relative levels of the line-haul rates is concerned, we are unable to follow the appellees in the theories advanced by them regarding the meaning of that evidence. At one place, the Government and the Commission say that this evidence shows (Br. 21) "that the gross rates to the Southeast were relatively lower to the shipper." At another place, the Government and the Commission say (Br. 37) (italics ours):

> "* * * Here, however, the fact that the ton and car mile gross earnings are lower to the Southeast is not employed by the Commission in support of the proposition that there is anything unlawful about the level of the respective line-haul rates. Rather, it is used merely to show that *the rate level to the shipper was relatively lower* on the traffic to the Southeast. Plainly, this evidence as to car and ton mile earnings has probative value for that purpose and constitutes substantial evidence."

The rates to the Southeast are actually higher in cents per hundred pounds than to the Texas ports, and the

shipper pays rates in cents per hundred pounds and not in mills per ton mile or in cents per car mile. Consequently, we fail to understand how the evidence relied upon shows either that the gross rates to the Southeast are lower than to the Texas ports or that the rate level to the shipper was relatively lower.

The railroad appellees say (Br. 42) that record contains testimony from Witness Bee, the traffic expert for the Oklahoma Commission, "to the effect that rates to the Southeast are relatively more depressed than rates to the Texas ports in consideration of 'cost'." The testimony of Witness Bee quoted by the appellees (R. 247-8) is that "the same reductions in cents per hundred pounds were made to the Southeast, but not relatively as to cost. I wouldn't say." Wholly apart from the question of whether such an unsupported categorical statement is evidence at all, the statement quoted is hopelessly ambiguous since a failure to reduce a rate "relatively as to cost" may mean that the reduction was less than it should be as measured by relative costs or that it was more than it should be as measured by the same yardstick. That ambiguity can hardly be resolved since there is no evidence in the record as to transportation costs or as to any other circumstance or condition relating to the line-haul services other than the mere matter of distance.

CONCLUSION.

Appellant respectfully submits that the decree of the District Court should be reversed and the case remanded with directions to enter the injunction as prayed for.

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